No.

IN THE
Supreme Court of the United States

RIMINI STREET, INC., AND SETH RAVIN,

Petitioners,

v.

ORACLE USA INC., ORACLE AMERICA, INC., AND ORACLE INTERNATIONAL CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Copyright Act's allowance of "full costs" (17 U.S.C. § 505) to a prevailing party is limited to taxable costs under 28 U.S.C. §§ 1920 and 1821, as the Eighth and Eleventh Circuits have held, or also authorizes non-taxable costs, as the Ninth Circuit holds.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties to the case below are named in the caption.

Pursuant to this Court's Rule 29.6, undersigned counsel state that petitioner Rimini Street, Inc. is a publicly traded Delaware corporation. Rimini Street, Inc. has no parent company and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Rimini Street, Inc. and Seth Ravin respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–35a) is reported at 879 F.3d 948. The district court's post-trial opinion (Pet. App. 43a–72a) is reported at 209 F. Supp. 3d 1200; its judgment (Pet. App. 38a–40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 2018, and that court denied a timely petition for rehearing on March 2, 2018. Pet. App. 36a–37a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of 17 U.S.C. § 505, and 28 U.S.C. §§ 1821 and 1920, is reproduced at Pet. App. 92a–95a.

STATEMENT

1. From 1799 until 1853, there was no federal statute specifying which categories of litigation costs could be recovered by a prevailing party in the federal courts, nor was there any federal statute limiting the amount of such recoverable costs. Rather, "federal courts ... refer[red] to state rules governing taxable costs." *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987). This led to disarray in cost recovery, with some "losing litigants ... being unfairly saddled with exorbitant" cost awards. *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 565 (2012).

Congress addressed this problem in the Fee Act of 1853, which was aimed at "the flagrant abuses" fostered when "[o]ne system prevails in one district, and a totally different one in another." Cong. Globe App., 32d Cong., 2d Sess. app. 207 (1853) (statement of Sen. Bradbury). The Act presented a "uniform rule" to stop the "exceedingly oppressive" size of cost awards, and to "simplify the taxation of [fees and costs], by prescribing a limited number of definite items to be allowed." *Ibid.*; *see also* Act of Feb. 26, 1853, ch. 80, 10 Stat. 161.

The result was "a far-reaching Act specifying in detail the nature and amount of the taxable items of cost in the federal courts." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 251–52 (1975). "The sweeping reforms of the 1853 Act [were] carried forward to today, without any apparent intent to change the controlling rules," with "Title 28 U.S.C. § 1920 now embod[ying] Congress' considered choice as to the kinds of expenses that a federal court may tax as costs against the losing party" (*Crawford Fitting Co.*, 482 U.S. at 440), and Section 1821 setting limits on amounts of some of those costs. These two

statutes "comprehensively regulate[]" costs "in the federal courts" (*ibid.*), and "define the full extent of a federal court's power to shift litigation costs absent express statutory authority to go further" (*W. Va. Univer. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 86 (1991)).

As this Court has recognized, "taxable costs" are supposed to be "limited" and "modest in scope." *Taniguchi*, 566 U.S. at 573. Section 1920 sets out six discrete categories of "taxable costs": fees for the clerk and marshal; transcript fees; disbursements for printing and witnesses; fees for making copies; docketing fees; and the compensation of court-appointed experts and certain special interpretation services. 28 U.S.C. § 1920(1)–(6). Section 1821, in turn, delineates witness attendance rates ($40-per-day), as well as per diem rules for witness travel expenses. *Id.* § 1821(a)–(f). All other cost categories or amounts in excess of the fixed rates are considered "non-taxable."

Congress can, of course, expand the universe of recoverable costs if it decides to. But this Court explained in *Crawford Fitting* that courts do not presume Congress has done so absent "explicit statutory ... authorization." 482 U.S. at 445. Thus, for instance, "no statute" can "be construed as authorizing the taxation of [expert] witness fees"—a category not found in Sections 1920 and 1821—"unless the statute refers explicitly to [expert] witness fees" and does so "unambiguously." *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 298, 301, 303 (2006).

2. Petitioner Rimini Street, Inc. engages "in lawful competition" with respondents by, among other things, providing third-party support for various enterprise software programs, the related copyrights for which are owned by respondents. Pet. App. 5a. "[U]nlike the off-the-shelf consumer software used by

individuals in everyday life, enterprise software employed by large organizations is customized around the organizations' specific needs." Pet. App. 11a. Thus, for instance, "[w]hile producers of consumer software generally design updates around standard use cases and make them available for end users to download and install directly, updates to enterprise software must be tested and modified to fit with bespoke customizations before being put to actual use." Pet. App. 11a. Much like one can take a car for service to the dealership or an independent auto mechanic, so too, respondents' licensees can shop around for aftermarket support, and sometimes they choose Rimini.

In 2010, respondents filed suit in federal district court against Rimini and Rimini's CEO, petitioner Seth Ravin, alleging numerous causes of action, ranging from copyright infringement to computer hacking. Pet. App. 6a. Respondents abandoned the vast majority of these claims before or at trial, but secured verdicts for innocent copyright infringement and violation of state anti-hacking statutes. Pet. App. 6a, 81a–82a. The jury awarded hypothetical license damages for innocent infringement in the amount of $35,600,000 and damages of just over $14 million for violations of state computer hacking statutes. Pet. App. 27a & n.7.

Post-trial, respondents moved for an "extensive permanent injunction" (Pet. App. 6a), as well as for approximately $35 million in attorneys' fees (Pet. App. 59a), more than $20 million in costs (Pet. App. 69a–70a), and over $22 million in prejudgment interest (Pet. App. 27a). The total award to respondents was approximately $124 million. Pet. App. 6a.

Included in respondents' cost award was over $12 million in non-taxable costs. Pet. App. 71a. The initial request consisted of $7,820,091.36 in "Expert Fees," $314,838.09 in "Consultant Fees," $8,271,552.59 in "Electronic Discovery Costs," and $1,230,273.64 in "Other Non-Taxable Costs," for a total of $17,636,755.68 in "Non-Taxable Costs." Pet. App. 73a–75a. The district court applied a 25% across-the-board reduction and a 50% reduction for the costs associated with one particular expert, making the total amount awarded "$12,774,550.26." Pet. App. 34a, 70a–71a.

Petitioners objected to the award of these non-taxable costs, arguing that any costs awarded under the Copyright Act were limited to taxable costs permitted by 28 U.S.C. §§ 1920 and 1821. The district court, however, followed Ninth Circuit precedent holding that the Copyright Act "permits a successful plaintiff to recover *all costs* incurred in litigation, not just taxable costs authorized by ... 28 U.S.C. § 1920." Pet. App. 70a. (citing *Twentieth Century Fox Film Corp.* v. *Entm't Distrib.*, 429 F.3d 869 (9th Cir. 2005)) (emphasis added). The Ninth Circuit affirmed, explaining that it was "bound by [its] precedent" in *Twentieth Century Fox*. Pet. App. 34a.[1]

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[1] The court of appeals, however, reversed the computer hacking verdicts and all associated damages and prejudgment interest awards, vacated the permanent injunction, and vacated the entire attorneys' fees award, remanding to the district court to reconsider the injunction and attorneys' fees "in light of [respondents'] more limited success at litigation." Pet. App. 32a. All told, the court of appeals reversed or vacated nearly $50 million of the total trial and post-trial awards.

3. Petitioners filed a timely petition for rehearing en banc, noting the conflict between the panel's decision and decisions in the Eighth and Eleventh Circuits. *See Pinkham* v. *Camex, Inc.*, 84 F.3d 292 (8th Cir. 1996) (per curiam); *Artisan Contractors Ass'n of Am., Inc.* v. *Frontier Ins. Co.*, 275 F.3d 1038 (11th Cir. 2001) (per curiam). Petitioners also argued that the Ninth Circuit's rule is directly contrary to this Court's decisions in *Crawford Fitting*, *Casey*, and *Murphy*. In opposition, respondents acknowledged the "circuit split" on the availability of non-taxable costs under the Copyright Act, but urged the Ninth Circuit to follow circuit precedent. Resp. C.A. Br. in Opp. 1, 12, No. 16-16832, Dkt. 93 (Feb. 14, 2018). The Ninth Circuit denied rehearing. Pet. App. 36a–37a.

REASONS FOR GRANTING THE PETITION

Congress enacted a *uniform* rule for the costs available to prevailing parties under federal statutory fee-shifting provisions, but the federal courts are sharply divided on the scope of available costs in copyright cases. Congress authorized the recovery of only those "taxable" costs specified in Sections 1920 and 1821, but in the Ninth Circuit, an unbounded set of "non-taxable" costs is available, exemplified here by a $12 million award of expert witness fees, consulting fees, and other costs not permitted by statute. This is an important and recurring question, made more acute by the Ninth Circuit's large copyright litigation docket, and by the fact that the question presented often escapes appellate review. The Court should grant the petition, reverse the Ninth Circuit's judgment, and restore uniformity on this important issue.

I. THERE IS A DIRECT AND ACKNOWLEDGED CIRCUIT SPLIT ON THE SCOPE OF "FULL COSTS" UNDER THE COPYRIGHT ACT

The circuits are divided on the question whether the Copyright Act's allowance for the recovery of "full costs" (17 U.S.C. § 505) overrides Sections 1920 and 1821, which generally limit cost awards in federal courts to identified categories of "taxable" costs. This Court should grant review in order to resolve this circuit conflict. *See* S. Ct. R. 10(a).

In *Pinkham* v. *Camex, Inc.*, 84 F.3d 292 (8th Cir. 1996) (per curiam), the plaintiff cross-appealed the denial of an award of "expert witness fees" in a copyright case, which exceeded the $40-per-day witness attendance fee rate set forth in Sections 1920 and 1821. *Id.* at 295. Relying on this Court's decisions in *Crawford Fitting* and *Casey*, the Eighth Circuit held that the words "full costs" did not "'clearly,' 'explicitly,' or 'plainly,' evidence[] congressional intent to treat 17 U.S.C. § 505 costs differently from costs authorized in other statutes." *Ibid.* Accordingly, the court held that costs under the Copyright Act are limited to the categories "expressly identified" in Section 1920 and the accompanying rate limitations imposed by Section 1821. *Ibid.*

In *Artisan Contractors Ass'n of America, Inc.* v. *Frontier Insurance Co.*, 275 F.3d 1038 (11th Cir. 2001) (per curiam), the Eleventh Circuit also considered whether expert witness fees could be taxed above and beyond the amounts permitted as attendance fees in Sections 1920 and 1821. *Id.* at 1038. The court concluded that "Section 505 [of the Copyright Act] makes no clear reference to witness fees, nor otherwise evinces a clear congressional intent to supercede the limitations imposed" by Congress's comprehensive

cost-shifting regime. *Id.* at 1039–40. Thus, it held that non-taxable costs are not recoverable under the Copyright Act.

In contrast, the Ninth Circuit in *Twentieth Century Fox* upheld tens of thousands of dollars in non-taxable costs under the Copyright Act, determining that the lone word "full" in the Copyright Act was "clear evidence of congressional intent that non-taxable costs should be available." 429 F.3d at 885. To hold otherwise, the court reasoned, "would be to violate the long standing principle ... that statutes should not be construed to make surplusage of any provision," because "[c]onstruing § 505 as limiting the costs that may be awarded to any particular subset of taxable costs effectively reads the word 'full' out of the statute." *Ibid.* The court expressly rejected *Pinkham* and *Artisan Contractors*, concluding that there could be "no other import to the phrase 'full costs'" other than to override Sections 1920 and 1821. *Ibid.* The court of appeals here, bound by *Twentieth Century Fox*, affirmed an award of over $12 million in expert witness fees and other non-taxable costs.[2]

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[2] The Sixth Circuit has also affirmed an award of non-taxable costs under Section 505 of the Copyright Act (*see Coles* v. *Wonder*, 283 F.3d 798, 803 (6th Cir. 2002)), but did so "without discussion" or acknowledgment of the contrary decisions of the Eighth and Eleventh Circuits (*Twentieth Century Fox*, 429 F.3d at 885). The First and Seventh Circuits have acknowledged the issue, but have avoided directly ruling on it. *See InvesSys, Inc.* v. *McGraw-Hill Cos.*, 369 F.3d 16, 22–23 (1st Cir. 2004) (holding that electronic legal research is part of "attorneys' fees" under Section 505); *Susan Wakeen Doll Co.* v. *Ashton Drake Galleries*, 272 F.3d 441, 458 (7th Cir. 2001) (holding that district court "erred in awarding attorney's fees as 'costs' under 28 U.S.C. § 1920" in copyright case).

The circuits are thus clearly divided over this important issue. *See* 4 *Nimmer on Copyright* § 14.09, pp. 14-312 to 14-313 (acknowledging and describing split); 6 *Patry on Copyright* § 22:221 ("Courts are split on whether nontaxable costs (those not listed in section 1920) may be awarded under section 505.").

Numerous district courts have also noted the "circuit split on the issue of whether non-taxable fees are recoverable under [Section] 505." *BMG Rights Mgmt. (US) LLC* v. *Cox Commc'ns, Inc.*, 234 F. Supp. 3d 760, 778–79 (E.D. Va. 2017), *vacated on other grounds*, 881 F.3d 293 (4th Cir. 2018). Some federal district courts have sided with the Eighth and Eleventh Circuits.[3]

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[3] *See, e.g.*, *ME2 Prods., Inc.* v. *Ahmed*, 289 F. Supp. 3d 760, 766 n.2 (W.D. Va. 2018) ("Although circuit courts disagree over whether § 505 is broader than 28 U.S.C. § 1920, the court will exercise its discretion to limit costs in this matter to those recoverable under § 1920."); *Humphreys & Partners Architects, L.P.* v. *Lessard Design, Inc.*, 152 F. Supp. 3d 503, 524 (E.D. Va. 2015) ("[T]here is a circuit split on whether or not 'full costs' encompasses more than the costs recoverable pursuant to Sections 1821 and 1920.... The Eighth and Eleventh Circuit's [position] ... is persuasive."); *Tempest Publ'g, Inc.* v. *Hacienda Records & Recording Studio, Inc.*, 141 F. Supp. 3d 712, 723 (S.D. Tex. 2015) ("Given ... the weight of circuit authority resting against a broad reading of § 505, the court concludes that the costs taxable under § 505 are limited to those enumerated in § 1920."); *Healthcare Advocates, Inc.* v. *Harding*, 2007 WL 2684016, at *1 (E.D. Pa. Sept. 10, 2007) ("The term 'full costs' in this statute refers to those costs allowed pursuant to 28 U.S.C. § 1920."); *Arista Records LLC* v. *Gaines*, 635 F. Supp. 2d 414, 418 (E.D.N.C. 2009) ("The district court's discretion [to award costs under Section 505] is limited by 28 U.S.C. § 1920."); *Schiffer Publ'g, Ltd.* v. *Chronicle Books, LLC*, 2005 WL 1244923, at *15 (E.D. Pa. May 24, 2005) ("[T]he 'full costs' language of § 505 does not constitute clear, explicit, or plain evidence of congressional intent to treat 17 U.S.C. § 505 costs differently from costs authorized in other

Other district courts have opted to follow the Ninth Circuit.[4]

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statutes ... expert witness fees taxable as costs pursuant to § 505" are limited by Sections 1920 and 1821."); *Boisson* v. *Banian Ltd.*, 221 F.R.D. 378, 379 (E.D.N.Y. 2004) ("costs recoverable in a copyright action, are those recoverable pursuant to 28 U.S.C. § 1920"); *Barrera* v. *Brooklyn Music, Ltd.*, 346 F. Supp. 2d 400, 405 (S.D.N.Y. 2004) ("[T]he 'full costs' referred to in § 505 of the Copyright Act are commensurate with those costs allowed under 28 U.S.C. § 1920."); *U.S. Media Corp.* v. *Edde Entm't, Inc.*, 1999 WL 498216, at *7 (S.D.N.Y. July 14, 1999) ("The weight of authority indicates that the 'full costs' referred to in the Copyright Act are nothing more than the costs allowed under 28 U.S.C. § 1920."); *NLFC, Inc.* v. *Devcom Mid-Am., Inc.*, 916 F. Supp. 751, 764 (N.D. Ill. 1996) ("[F]or experts not appointed by the Court, the prevailing party may only recover the statutory amount prescribed in § 1821 and not any additional expert fees unless permitted by specific provision of a fee shifting statute."); *Data Gen. Corp.* v. *Grumman Sys. Support Corp.*, 825 F. Supp. 361, 367 (D. Mass. 1993), *aff'd and remanded*, 36 F.3d 1147 (1st Cir. 1994) ("The implication of [*Crawford* and *Casey*] is that 28 U.S.C. § 1920 defines the 'costs' that may be awarded under ... [Section] 505 of the Copyright Act.").

[4] *See, e.g.*, *Clear Skies Nev., LLC* v. *Hancock*, No. 1:15-cv-06708, Dkt. 113, at 7 (N.D. Ill. Dec. 5, 2017) ("The Court finds the reasoning of the Ninth Circuit persuasive and follows its holding that full expert witness costs are available to prevailing parties under § 505."); *Ronaldo Designer Jewelry, Inc.* v. *Prinzo*, 2017 WL 3588806, at *7 (S.D. Miss. Aug. 21, 2017); *Clarity Software, LLC* v. *Fin. Indep. Grp., LLC*, 2016 WL 3083383, at *7 (W.D. Pa. May 31, 2016) ("Section 505 authorizes the award of a broader sweep of costs to a prevailing party than does Section 1920."); *Guzman* v. *Hacienda Records, L.P.*, 2015 WL 5254067, at *3 (S.D. Tex. Sept. 9, 2015); *Eagle Servs. Corp.* v. *H2O Indus. Servs., Inc.*, 2012 WL 3255606, at *4 (N.D. Ind. Aug. 8, 2012) ("investigation, expert witnesses, mock trial," costs "are recoverable" under Section 505); *Compass Homes, Inc.* v. *Heritage Custom Homes, LLC*, 2015 WL 4639654, at *10 (S.D. Ohio Aug. 3, 2015).

Respondents have already acknowledged the "circuit split on [the] cost-award issue." Resp. C.A. Br. in Opp. 1, 12. To put it mildly, "[t]here is a lot of disagreement on this point." *Clarity Software*, 2016 WL 3083383, at *6. This Court should, therefore, grant review to decide whether the Copyright Act's allowance of "full costs" is limited to taxable costs (as most courts of appeals to have considered the issue hold) or also permits non-taxable costs (as the court below ruled).[5]

II. The Ninth Circuit's Decision Conflicts With This Court's Precedents And Is Wrong

The Ninth Circuit's decision is in conflict with this Court's settled precedent on the scope of Sections 1920

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[5] Several other statutes, like Section 505, permit the recovery of "full costs." *See* Semiconductor Chip Protection Act of 1984, 17 U.S.C. § 911(f) ("[T]he court in its discretion may allow the recovery of full costs, including reasonable attorneys' fees, to the prevailing party."); Judicial Code, 28 U.S.C. § 4001(g) ("[T]he court in its discretion may allow the recovery of full costs by or against any party and may also award a reasonable attorney's fee to the prevailing party as part of the costs."); Cable Communications Policy Act of 1984, 47 U.S.C. § 553(c)(2)(C) ("The court may ... direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails."); Communications Act of 1934, 47 U.S.C. § 605(e)(3)(B)(iii) ("The court ... shall direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails."). And district courts are split on whether non-taxable costs are recoverable under the Communications Act. *Compare, e.g.*, *Kingvision Pay-Per-View Ltd.* v. *Autar*, 426 F. Supp. 2d 59, 67 (E.D.N.Y. 2006), *with, e.g.*, *J & J Sports Prods., Inc.* v. *Argueta*, 2017 WL 628299, at *3 (W.D. Ark. Feb. 15, 2017), *and EchoStar Satellite Corp.* v. *NDS Grps. PLC*, 2009 WL 10675250, at *2 (C.D. Cal. July 17, 2009).

and 1821, and misinterprets the Copyright Act, warranting this Court's review. *See* S. Ct. R. 10(c).

1. The Ninth Circuit concluded that the single word "full" in "full costs" constituted "clear" and unambiguous "evidence of congressional intent" sufficient to override a centuries-old and comprehensive taxable costs regime. *Twentieth Century Fox*, 429 F.3d at 885. That conclusion cannot be reconciled with this Court's holdings and reasoning in *Crawford Fitting*, *Casey*, and *Murphy*.

In *Crawford Fitting*, the prevailing parties had submitted a bill of costs seeking tens of thousands of dollars of expert witness fees on the theory that Federal Rule of Civil Procedure 54(d) "granted [the district court] discretion to exceed the $30-per-day witness fee limit found in 28 U.S.C. § 1821(b)." 482 U.S. at 439.

This Court rejected that argument, holding that when "a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound" by the limitations of Sections 1920 and 1821. 482 U.S. at 439. After examining the history of Congress's "comprehensive[] regulat[ion] [of] fees and the taxation of fees as costs in the federal courts," this Court laid down a simple and clear rule: Unless there is "plain evidence of congressional intent to supersede [Sections 1920 and 1821]," a court may not assess nontaxable costs, such as expert fees, against a losing party. *Id.* at 440, 445; *see also id.* at 445 ("We hold that absent explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs, federal courts are bound by the limitations set out in 28 U.S.C. § 1821 and § 1920.").

This Court reiterated and applied this rule in *Casey*, where it considered "whether the term 'attorney's fee' in [42 U.S.C. § 1988] provides the 'explicit statutory authority' required by *Crawford Fitting*," or alternatively, whether such fees might be considered "part of the 'costs' allowed by § 1988." 499 U.S. at 87 & n.3. The answer to both questions was a resounding *no*.

The Court in *Casey* observed that Sections 1920 and 1821 "define *the full extent* of a federal court's power to shift litigation costs absent *express statutory authority to go further*." *Casey*, 499 U.S. at 86 (emphases added). Section 1988 did not contain any provision "referring explicitly" to categories of costs beyond Sections 1920 and 1821, unlike numerous statutes enacted "[i]n 1976, just over a week prior" to the version of Section 1988 in force at the time. *Id.* at 87–88. Those statutes, unlike Section 1988, expressly shifted expert fees. *Id.* at 88. The Court took this as powerful evidence that Congress knew how to provide for cost categories beyond those in Section 1920, thus rejecting the party's argument that it could recover these non-taxable costs. *Ibid.*

Murphy concerned whether the Individuals with Disabilities Education Act permits the recovery of expert fees when it provides that a court "may award reasonable attorneys' fees as part of the costs" to prevailing parents. 548 U.S. at 293–94. The Court held that "it does not." *Id.* at 294.

The Court again emphasized the *Crawford Fitting* rule: Under "*Crawford Fitting*[,] *no statute* will be construed as authorizing the taxation of witness fees as costs unless the statute refers explicitly to witness fees." 548 U.S. at 301 (emphasis added). "'[C]osts' is a term of art" that "obviously" refers to "the list set out

in 28 U.S.C. § 1920" and "§ 1821," both of which govern "the taxation of costs in federal court" and "strictly limit[]" recoveries of expenses such as witness fees. *Id.* at 297–98.

The inescapable teaching of *Murphy* is that under *Crawford Fitting* and *Casey*, "a cost- or fee-shifting provision will not be read to permit a prevailing party to recover expert fees without explicit statutory authority indicating that Congress intended *for that sort of fee-shifting*." 548 U.S. at 295 (emphasis added).

2. The Ninth Circuit's decision conflicts with this clear precedent because the phrase "full costs" in the Copyright Act does not explicitly provide for the "*sort of fee-shifting*" the Ninth Circuit endorsed here—nontaxable costs such as expert witness fees, jury consulting fees, electronic discovery costs, etc. *Murphy*, 548 U.S. at 295 (emphasis added).

Congress knows how to shift expert witness fees, and it has done so on many occasions. *See, e.g.*, 5 U.S.C. § 504(b)(1)(A) ("'fees and other expenses' includes the reasonable expenses of expert witnesses"); 15 U.S.C. § 2805(d)(1)(C) (providing for recovery of "reasonable attorney and expert witness fees"); 54 U.S.C. § 307105 (prevailing party may receive "attorney's fees, expert witness fees, and other costs of participating in the civil action, as the court considers reasonable."); 16 U.S.C. § 825q-1(b)(2) ("compensation for reasonable attorney's fees, expert witness fees, and other costs of intervening or participating in any proceeding"); 26 U.S.C. § 7430(c)(1)(A)–(B) ("The term 'reasonable litigation costs' includes ... reasonable court costs, and ... the reasonable expenses of expert witnesses in connection with a court proceeding...."). Indeed, Congress passed numerous statutes contemporaneously with the Copyright Act that *did*

expressly provide for the shifting of expert fees, but omitted such fee-shifting in the Copyright Act. *Compare Casey*, 499 U.S. at 87–88, *with* Pub. L. 94-559, 90 Stat. 2641 (Oct. 19, 1976) (42 U.S.C. § 1988), *and id.* § 101, 90 Stat. 2586 (17 U.S.C. § 505).

Congress also frequently uses different terminology, such as "expenses," when it intends to expand the scope of what is available under Sections 1920 and 1821. *Murphy*, 548 U.S. at 297. But here, Congress's invocation of the word "costs" is a "term of art" that "strongly suggests" that Section 505 of the Copyright Act "was not meant to be an open-ended provision" making parties "liable for all expenses incurred by prevailing" parties in copyright litigation. *Ibid.*

By authorizing "costs" in the Copyright Act, Congress authorized *taxable* costs, as specified in Sections 1920 and 1821—as *Murphy* recognizes. A prevailing party is thus entitled, in the district court's discretion, to its taxable costs; but courts have no discretion under the Copyright Act to award non-taxable costs.

3. There is nothing about the word "full" that expressly authorizes non-taxable costs. The Ninth Circuit concluded that "there can be no other import to the phrase 'full costs'" besides overriding Sections 1920 and 1821. *Twentieth Century Fox*, 429 F.3d at 885. That is wrong, as numerous courts have explained. *E.g.*, *Humphreys & Partners*, 152 F. Supp. 3d at 525; *see also BMG Rights Mgmt.*, 234 F. Supp. 3d at 779; *Under a Foot Plant, Co.* v. *Exterior Design, Inc.*, 2017 WL 3840260, at *4 (D. Md. Sept. 1, 2017) (dicta); *Fharmacy Records* v. *Nassar*, 729 F. Supp. 2d 865, 893 (E.D. Mich. 2010); *EMI Apr. Music, Inc.* v. *Garland Enters., LLC*, 2012 WL 2342994, at *3 (D. Md. June 19, 2012). "'[F]ull' has another possible, non-superfluous meaning"; it "refer[s] to *the degree of*

costs recoverable under §§ 1821 and 1920." *Humphreys & Partners*, 152 F. Supp. 3d at 525 (emphasis added).

The conclusion of the courts above is consistent with the longstanding historical meaning of the phrase "full costs" in federal copyright statutes. That phrase never meant, and does not today mean, "all categories of litigation expenses." Rather, "full costs" is little more than an indication that whatever "costs" are authorized as taxable under federal law, *those* costs are available in "full" at the discretion of the district court. In other words, no prevailing party in a copyright case is precluded from recovering its taxable costs. That reasoning, unlike the Ninth Circuit's, has a sterling historical pedigree.

Until the passage of the Fee Act of 1853, federal copyright cases were subject to the "state rules governing taxable costs." *Crawford Fitting*, 482 U.S. at 439; *see also Alyeska Pipeline*, 421 U.S. at 250. Congress first provided for "full costs" in 1831, when it revised the copyright statute to say that "in all recoveries under [the copyright statute,] ... *full costs* shall be allowed thereon, *any thing in any former act to the contrary notwithstanding*." Act of Feb. 3, 1831, ch. 16, § 12, 4 Stat. 436, 438–39 (emphases added). The reason for this language was that for a time, the circuit courts of the United States had original jurisdiction over copyright actions (*see* Act of Feb. 15, 1819, ch. 19, 3 Stat. 481, 481), which also meant that if a prevailing plaintiff recovered less than $500, exclusive of costs, he was barred from recovering his own costs and could also "be adjudged to *pay* costs" for the other side (Judiciary Act of 1789, ch. 20, § 20, 1 Stat. 73, 83). Thus, the "full costs" language did not expand the substan-

tive categories of costs available—which were governed by state law—but simply overrode the potential penalty when a plaintiff recovered less than $500 in damages.

As the House Report to the 1909 Act explained, "[t]he provision for full costs" was meant only to override the $500-threshold cost penalty. H.R. Rep. No. 2222, 60th Cong., 2d Sess. 19 (1909). And the phrase "full costs" was carried forward, unaltered, into the 1976 Copyright Act.[6] There is no evidence suggesting that "full costs" expanded the scope of available cost categories. Indeed, legislative history for the 1976 Act shows it was "merely an attempt to explicitly grant discretionary authority ... in connection with the award of costs" (*Stevens Linen Assocs.* v. *Mastercraft Corp.*, 1981 WL 1426, at *3 (S.D.N.Y. Feb. 17, 1981)), because under the 1909 Act, full costs were mandatory (*Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 524 n.11

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[6] Congress used this "full costs" language in each iteration of the Copyright Act. *See, e.g.*, Copyright Act of 1870, ch. 230, § 108, 16 Stat. 198, 215; Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, § 40, 35 Stat. 1075, 1084; 17 U.S.C. § 40 (1934); Act of July 30, 1947, ch. 391, § 116, 61 Stat. 652, 665; 17 U.S.C. § 116 (1958); *id.* § 116 (1970); Copyright Act of 1976, Pub. L. No. 94-553, § 505, 90 Stat. 2541, 2586. And like the Copyright Act, neither the text nor the legislative history of other statutes using the phrase "full costs" indicates that Congress was seeking to override Sections 1920 and 1821. *See* 17 U.S.C. § 911(f); 28 U.S.C. § 4001(g); 47 U.S.C. § 553(c)(2)(C); 47 U.S.C. § 605(e)(3)(B)(iii). If anything, the legislative history of 17 U.S.C. § 911(f) shows that a prior version of the bill had a broader phrase, "expenses of suit," which was then narrowed to "full costs." *Compare Copyright Protection for Semiconductor Chips: Hearing on H.R. 1028 Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the H. Comm. on the Judiciary*, 98th Cong. 169 (1983), *with* Murphy, 548 U.S. at 297 (contrasting "costs" and "expenses").

(1994); *see also* H.R. Rep. No. 94-1476, at 163 (1976) ("Under section 505 the awarding of costs and attorney's fees are left to the court's discretion."); S. Rep. No. 94-473 (1975) (same)). Congress's repeated use of the term of art, "costs," (as opposed to witness fees, expenses, or some other word) shows that it meant taxable costs throughout. *Murphy*, 548 U.S. at 297.

The Ninth Circuit's decision is in direct conflict with this Court's settled precedents and with the evident meaning of the Copyright Act.

III. National Uniformity On The Question Presented Is Exceptionally Important

The split among the courts of appeals disrupts "the uniformity Congress sought to achieve" under the Copyright Act (*Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1975 (2014)) and simultaneously undermines the very evils Congress expressly set out to eradicate with the passage of the Fee Act and its successor statutes, Sections 1920 and 1821 (*see also* David Nimmer, *Codifying Copyright Comprehensibly*, 51 U.C.L.A. L. Rev. 1233, 1286–88 & Tbl. A (2004) (labeling the "[c]osts and fees" provision of Section 505 as "nationally significant")). Exorbitant costs are awarded in the Ninth Circuit that are unavailable in other circuits—a particular problem, given the volume of copyright cases decided in the Ninth Circuit.

During 2017, there were over 3,700 cases invoking federal copyright law commenced in the federal district courts. *See Federal Judicial Caseload Statistics, 2017, U.S. Dist. Cts.—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit,* Table C-2 at 4 (Mar. 31, 2017). The year before that, there were over 5,000 such cases. *Ibid.* And the district courts com-

prising the Ninth Circuit hear more intellectual property cases than the district courts of any other circuit in the country. *See Federal Judicial Caseload Statistics, 2017, U.S. Dist. Cts.—Civil Cases Commenced, by Nature of Suit and Dist.*, Table C-3 at 1–6 (Mar. 31, 2017).

Unsurprisingly, given the rule laid out in *Twentieth Century Fox*, courts in the Ninth Circuit routinely award non-taxable costs.[7] And it is not uncommon, as

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[7] *E.g.*, *Perfect 10, Inc.* v. *Giganews, Inc.*, 2015 WL 1746484, at *1 (C.D. Cal. Mar. 24, 2015), *aff'd*, 847 F.3d 657 (9th Cir. 2017); *Pringle* v. *Adams*, 2014 WL 3706826, at *7–8 (C.D. Cal. July 23, 2014); *Wyatt Tech. Corp.* v. *Malvern Instruments, Inc.*, 2010 WL 11404472, at *4–5 (C.D. Cal. June 17, 2010); *ExperExchange, Inc.* v. *Doculex, Inc.*, 2010 WL 1881484, at *1 (N.D. Cal. May 10, 2010); *Althouse* v. *Warner Bros. Entm't*, 2014 WL 12599798, at *4 (C.D. Cal. June 17, 2014); *Liguori* v. *Hansen*, 2017 WL 627219, at *14 (D. Nev. Feb. 15, 2017); *VMG Salsoul, LLC* v. *Ciccone*, 2014 WL 12585798, at *13 (C.D. Cal. Apr. 28, 2014); *Kourtis* v. *Cameron*, 358 F. App'x 863, 868 (9th Cir. 2009); *Lanard Toys Ltd.* v. *Novelty, Inc.*, 2008 WL 11333941, at *22 (C.D. Cal. Mar. 18, 2008); *Express LLC* v. *Forever 21*, 2010 WL 11512410, at *9 (C.D. Cal. Nov. 15, 2010); *Gilbert* v. *New Line Prods., Inc.*, 2010 WL 5790688, at *6 (C.D. Cal. Dec. 6, 2010), *aff'd in part, vacated in part, remanded*, 490 F. App'x 34 (9th Cir. 2012); *Paramount Pictures Corp.* v. *Int'l Media Films Inc.*, 2015 WL 12745843, at *10 (C.D. Cal. Feb. 18, 2015); *AAA Flag & Banner Mfg., Co.* v. *Flynn Signs & Graphics Inc.*, 2010 WL 11462990, at *4 (C.D. Cal. July 19, 2010); *Identity Arts* v. *Best Buy Enter. Servs. Inc.*, 2008 WL 820674, at *9 (N.D. Cal. Mar. 26, 2008); *Yue* v. *Storage Tech. Corp.*, 2008 WL 4185835, at *6 (N.D. Cal. Sept. 5, 2008); *Seoul Broad. Sys. Int'l, Inc.* v. *Korea Int'l Satellite Broad.*, 2009 WL 10672770, at *10 (C.D. Cal. June 19, 2009); *Atl. Recording Corp.* v. *Andersen*, 2008 WL 2536834, at *3 (D. Or. June 24, 2008); *Watermark Publishers* v. *High Tech. Sys. Inc.*, 1997 WL 717677, at *13 (S.D. Cal. June 18, 1997); *Righthaven LLC* v. *DiBiase*, 2011 WL 5101938, at *1 (D. Nev. Oct. 26, 2011); *Braddock* v. *Jolie*, 2013 WL 12130563, at *5 (C.D. Cal. June 7, 2013); *Gable* v. *NBC*,

this case demonstrates, for such awards to reach into the hundreds of thousands, millions, and even *tens of millions* of dollars. *E.g.*, Pet. App. 71a (awarding over $12 million in non-taxable costs); *Mattel, Inc.* v. *MGA Entm't, Inc.*, 2011 WL 3420603, at *9 (C.D. Cal. Aug. 4, 2011), *aff'd* 705 F.3d 1108 (9th Cir. 2013) (awarding $31,667,104 out of "approximately $40 million in costs" sought under Section 505).[8]

Litigants in other circuits, in contrast, do not stand to receive (or pay) such exorbitant cost awards in copyright cases. The judgment in this case is at least 17% higher because it was brought in the Ninth Circuit rather than in the Eighth or Eleventh, where prevailing parties are limited to non-taxable costs. One party should not receive a multi-million-dollar

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2010 WL 11506430, at *1 (C.D. Cal. Aug. 6, 2010); *Lewis* v. *Activision Blizzard, Inc.*, 2014 WL 4953770, at *5 (N.D. Cal. Sept. 25, 2014); *Symantec Corp.* v. *CD Micro, Inc.*, 2005 WL 1972563, at *5 (D. Or. Aug. 12, 2005); *Asset Vision, LLC* v. *Fielding*, 2014 WL 7186840, at *4 (D. Idaho Dec. 16, 2014); *DuckHole Inc.* v. *NBCUniversal Media LLC*, 2013 WL 5797204, at *6 (C.D. Cal. Oct. 25, 2013); *Berry* v. *Hawaiian Express Serv., Inc.*, 2006 WL 4102120, at *16–17 (D. Haw. Oct. 25, 2006); *Nat'l Comm'n for Certification of Crane Operators.* v. *Ventula*, 2010 WL 2179505, at *6 (D. Haw. Apr. 30, 2010); *Malibu Media, LLC* v. *Sianturi*, 2017 WL 3328082, at *8 (E.D. Cal. Aug. 4, 2017); *Wild* v. *NBC Universal*, 2011 WL 12877031, at *3 (C.D. Cal. July 18, 2011); *Niven* v. *Brewster*, 2012 WL 13005444, at *4 (C.D. Cal. Apr. 11, 2012); *WB Music Corp.* v. *S. Beach Rest., Inc.*, 2009 WL 5128510, at *1 (D. Ariz. Dec. 21, 2009).

[8] *See also, e.g.*, *Perfect 10*, 2015 WL 1746484, at *1 ($424,235.47); *Pringle*, 2014 WL 3706826, at *7–8 ($300,096.24); *Wyatt Tech.*, 2010 WL 11404472, at *4–5 ($79,611.61); *ExperExchange*, 2010 WL 1881484, at *1 ($58,509.47); *Althouse*, 2014 WL 12599798, at *4 ($57,739.38); *Liguori*, 2017 WL 627219, at *14 ($53,719.07); *VMG Salsoul*, 2014 WL 12585798, at *13 ($50,055.00).

windfall (and the other be forced to foot a large payout) solely based on the district in which suit is commenced.

This is *exactly* the problem Congress sought to remedy nearly 170 years ago. *See Alyeska Pipeline*, 421 U.S. at 247–50 & n.19; *Crawford Fitting*, 482 U.S. at 439; *Taniguchi*, 566 U.S. at 565. The Ninth Circuit's practice returns the federal courts to the days before the 1853 Fee Act, where "[o]ne system prevails in one district, and a totally different one in another." Cong. Globe App., 32d Cong., 2d Sess. app. 207. As a consequence, there are "flagrant abuses" and "exceedingly oppressive" fee awards being doled out in the Ninth Circuit, where parties can recover millions upon millions of dollars they cannot recover in other jurisdictions on the same claims.

What is more, the Ninth Circuit's rule substitutes its judgment for that of Congress as to how best to provide for costs in copyright litigation. The court of appeals is wrong as a matter of construction, *see supra* Part II, but its decision to cast aside Sections 1920 and 1821 necessarily trammels on the "separation of powers" as well by too easily concluding that one statute "displaces the other," without "a clearly expressed congressional intention," *Epic Sys. Corp.* v. *Lewis*, No. 16-285, slip op. 10 (U.S. May 21, 2018).

This Court should step in to restore Congress's intended regime and bring uniformity back to Copyright Act costs. *See Taylor* v. *United States*, 504 U.S. 991, 991 (1992) (White, J., dissenting from the denial of certiorari) ("One of the Court's duties is to do its best to see that the federal law is not being applied differently in the various circuits around the country.").

IV. This Case Is An Ideal Vehicle For Addressing A Question That Often Escapes Appellate Review

The important and frequently recurring question presented often evades appellate review, and thus this Court's ultimate review. It is, however, squarely presented here, making this case an ideal vehicle for this Court's resolution of the question.

Recoverable litigation costs are usually modest—as they should be. *See Taniguchi*, 566 U.S. at 573. In many cases that award may amount to only a few thousand dollars. Notably, this Court has granted certiorari to review awards of non-taxable costs under Section 1920 of only a few thousand dollars. *See* Pet. 6, *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 2011 WL 2192279 (U.S.) (June 3, 2011) (non-taxable cost award of $5,517.20); *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 564 U.S. 1066 (2011) (granting certiorari). Yet parties often do not appeal an award of costs simply because the cost of the appeal may outweigh the challenged cost award.

Even where the size of a non-taxable cost award independently justifies an appeal, the issue can still easily evade appellate review. Costs are, almost by definition, the *last* item raised on appeal, and, as a result, are often not decided by the courts of appeals. For instance, in a recent case in the Fourth Circuit, a party sought nearly $3 million in non-taxable costs under the Copyright Act. The district court denied the award, recounting the circuit split and siding with the Eighth and Eleventh Circuits. *BMG Rights Mgmt.*, 234 F. Supp. 3d at 779. The parties fully briefed the issue before the Fourth Circuit, but the court of appeals reversed on one of the primary issues on ap-

peal—an erroneous jury instruction—and did "not address the merits of [the fee and cost] awards." *BMG Rights Mgmt. (US) LLC* v. *Cox Commc'ns, Inc.*, 881 F.3d 293, 301 n.1 (4th Cir. 2018).

This case—cleanly presenting a *$12 million* nontaxable cost award—thus presents an ideal opportunity and vehicle for this Court to address the question presented, and to bring clarity to this important question that has divided the lower courts. The question presented is binary: Either the Copyright Act limits recoverable costs to taxable costs under Sections 1920 and 1821, or it does not. The issue was cleanly presented and decided in both the district court and the court of appeals. Both parties have acknowledged the circuit split on the issue. The panel below followed circuit precedent, and rehearing was denied; so only this Court's review can resolve the conflict. Such review is warranted now, in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORACLE USA, INC., a Colorado corporation; ORACLE AMERICA, INC., a Delaware corporation; ORACLE INTERNATIONAL CORPORATION, a California corporation, *Plaintiffs-Appellees,* v. RIMINI STREET, INC., a Nevada corporation; SETH RAVIN, an individual, *Defendants-Appellants.*	Nos. 16-16832 16-16905 D.C. No. 2:10-cv-00106-LRH-VCF OPINION

Appeals from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Argued and Submitted July 13, 2017
San Francisco, California

Filed January 8, 2018

Before: Susan P. Graber and Michelle T. Friedland, Circuit Judges, and Jeremy D. Fogel,* District Judge.

Opinion by Judge Fogel

SUMMARY**

Copyright

The panel affirmed in part, reversed in part, and vacated in part the district court's judgment after a jury trial in favor of Oracle USA, Inc., on its copyright infringement and California and Nevada state law claims against Rimini Street, Inc., a provider of third-party support for Oracle's enterprise software, and Seth Ravin, Rimini's CEO.

Oracle licenses its software and also sells its licensees maintenance contracts. The maintenance work includes software updates. In order to compete effectively with Oracle's direct maintenance services, Rimini needed to provide software updates to its customers. With Oracle's knowledge, Rimini copied Oracle's copyrighted software in order to provide the updates. Rimini obtained software from Oracle's website with automated downloading tools in direct contravention of the terms of the website.

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* The Honorable Jeremy D. Fogel, United States District Judge for the Northern District of California, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel affirmed the district court's partial summary judgment and partial judgment after trial on Oracle's claims that Rimini infringed its copyright by copying under the license of one customer for work performed for other existing customers or for unknown or future customers, rather than restricting such copying to work for that particular customer. The panel concluded that Rimini's activities were not permissible under the terms of the licenses Oracle granted to its customers. The panel rejected Rimini's argument that holding it accountable for its alleged conduct would condone misuse of Oracle's copyright.

The panel reversed the district court's judgment after trial with respect to Oracle's claims under the California Comprehensive Data Access and Fraud Act, the Nevada Computer Crimes Law, and California's Unfair Competition Law. The panel held that taking data from a website, using a method prohibited by the applicable terms of use, when the taking itself generally is permitted, does not violate the CDAFA or the NCCL. Accordingly, Rimini did not violate these computer abuse statutes by using automated tools to take data in direct contravention of Oracle's terms of use. Because the district court granted judgment in favor of Oracle on Oracle's Unfair Competition Law claim based on its finding that Rimini violated the CDAFA, the panel reversed the district court's determination that Rimini violated California's Unfair Competition Law.

The panel reduced the district court's award of damages by the amount based on Rimini's alleged violation of the CDAFA and NCCL. The panel affirmed the district court's award of prejudgment interest on the copyright claims.

The panel reversed the district court's permanent injunction based on alleged violations of the CDAFA. The panel vacated the district court's permanent injunction based on copyright infringement because the district court assessed the relevant factors by reference to both the copyright and the CDAFA claims, without considering separately the propriety of issuing an injunction as to the copyright claims alone.

The panel reversed the district court's judgment with respect to Ravin's liability for attorneys' fees. As to Rimini, the panel vacated the fee award and remanded for reconsideration in light of Oracle's more limited success at litigation in view of the panel's conclusion that there was no violation of the state computer laws.

The panel reduced the district court's award of taxable costs and affirmed its award of non-taxable costs.

COUNSEL

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Jamie Williams and Aileen Nguyen, San Francisco, California, as and for Amicus Curiae Electronic Frontier Foundation.

OPINION

FOGEL, District Judge:

Oracle USA, Inc. and related entities (collectively, "Oracle") licenses its proprietary enterprise software for a substantial one-time payment. Oracle also sells its licensees maintenance contracts for the software that are renewed on an annual basis. The maintenance work includes software updates, which Oracle makes available to purchasers of the contracts through its support website.

At all relevant times, Rimini Street, Inc. ("Rimini") provided third-party support for Oracle's enterprise software, in lawful competition with Oracle's direct maintenance services. But in order to compete effectively, Rimini also needed to provide software updates to its customers.[1] Creating these software updates inherently required copying Oracle's copyrighted software, which, unless allowed by license, would be copyright infringement. With Oracle's knowledge, Rimini in fact did copy the software to provide the updates. At least from late 2006 to early 2007, Rimini obtained software from Oracle's website with automated downloading tools in direct contravention of the terms of use of the website.

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[1] All of Rimini's customers pertinent to this dispute were licensees of Oracle's software, but not all licensees of Oracle's software are Rimini's customers. To avoid confusion, we will use the word "customers" to refer to the subset of Oracle's licensees who did contract or might contract with Rimini for the maintenance of Oracle's software.

Oracle filed suit against Rimini and Rimini's CEO, Seth Ravin ("Ravin"), in the District of Nevada in 2010. After lengthy and sometimes contentious discovery and motion practice, the district court granted partial summary judgment to Oracle on certain aspects of Oracle's copyright infringement claim, and a jury found in favor of Oracle on others after trial. The jury also found against both Rimini and Ravin with respect to Oracle's claims under the California Comprehensive Data Access and Fraud Act ("CDAFA") and the Nevada Computer Crimes Law ("NCCL") (collectively, the "state computer laws"). Based on the jury's determination with respect to the CDAFA claim, the district court entered judgment against Rimini and Ravin under California's Unfair Competition Law ("UCL"). The jury awarded damages in the sum of $50,027,000 which, when prejudgment interest, attorneys' fees and costs were added, resulted in a total monetary judgment of $124,291,396.82. The district court also issued an extensive permanent injunction. Rimini subsequently filed this timely appeal. The Electronic Frontier Foundation ("EFF") has filed an amicus brief with respect to the state computer law claims.

The first principal dispute in this case is whether Rimini copied Oracle's software in a manner that infringed Oracle's copyright. It is undisputed that Rimini used Oracle's software to develop and test updates for its customers and that the software licenses, with certain restrictions, permitted Oracle's licensees to hire Rimini to perform such work for them. There are numerous subtleties involved but, at the highest level of generality, Rimini's alleged copyright infringement included copying under the license of one customer for work for other existing customers or for unknown or future customers, rather

than restricting such copying to work for that particular customer. The second principal dispute is whether Rimini and Ravin violated applicable state laws intended to prevent computer-based fraud by flouting Oracle's restrictions against the use of automated tools to download software from its website. We also consider the appropriateness of the remedies awarded by the district court.

As explained below, we affirm the judgment with respect to the copyright infringement claims. We also affirm the remedies with respect to those claims, except that we vacate the injunction and the award of attorneys' fees and remand for reconsideration in light of this opinion. We modify the district court's award of taxable costs as the parties have agreed. We reverse the judgment with respect to Oracle's claims under the state computer laws and the UCL.

I. Copyright Infringement Claims

A. The Software in Suit[2]

Four software products are at issue: J.D. Edwards, Siebel, PeopleSoft, and Database. The products are related, but they do not perform identical functions. As the district court explained:

> Oracle's Enterprise Software platforms have both an installed database component and an installed application component. The database component provides a foundation for the application software which then uses, stores, and

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[2] The district court specifically distinguished between Oracle's copyright in software and Oracle's copyright in the software documentation. Rimini does not appeal the jury's determination that Rimini infringed the documentation copyright.

> retrieves data in the database for use across an entire organization. Oracle's Enterprise Software application programs— including its PeopleSoft, J.D. Edwards, and Siebel-branded products—are run on Oracle's Relational Database Management Software ("Oracle Database") as the database component for the programs.

Oracle USA, Inc. v. Rimini St., Inc., 6 F. Supp. 3d 1108, 1113 (D. Nev. 2014) ("*Oracle II*"). J.D. Edwards, Siebel, and PeopleSoft were acquired by Oracle from other companies, while Oracle developed Database internally.

Because of this history and because of the technical differences among them, the licensing terms of the four products are not identical. We first address J.D. Edwards and Siebel. We next turn to PeopleSoft and, finally, to Database.

B. J.D. Edwards and Siebel

Oracle's claims as to the J.D. Edwards and Siebel software were submitted to the jury. Rimini appeals the district court's denial of its motion for judgment as a matter of law following the jury's verdict. "We review de novo the district court's denial of a motion for judgment as a matter of law. A renewed motion for judgment as a matter of law is properly granted only 'if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict." *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1066 (9th Cir. 2016) (en banc) (citations omitted) (quoting *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002)) (internal quotation mark omit-

ted), *cert. denied*, 137 S. Ct. 831 (2017). "A jury's verdict must be upheld if it is supported by substantial evidence, which is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion." *Id.* (quoting *Pavao*, 307 F.3d at 918) (internal quotation marks omitted).

Rimini challenges the jury's finding of copyright infringement with respect to these products on two grounds. First, it argues that its activities were permissible under the terms of the licenses Oracle granted to its customers. Second, it contends that holding it accountable for its alleged conduct would condone copyright misuse. Neither of these arguments is persuasive.

1. Express License Defense

As will be explained in further detail, there is no dispute that, absent an applicable license, Rimini's accused acts violated the exclusive right Oracle enjoys as owner of the software copyright to copy or to modify the software. Rimini asserts as an affirmative defense that its accused acts were expressly licensed.

The Supreme Court has explained the express license defense as follows:

> "Anyone who violates any of the exclusive rights of the copyright owner," that is, anyone who trespasses into his exclusive domain by using or authorizing the use of the copyrighted work in one of the five ways set forth in the statute, "is an infringer of the copyright." Conversely, anyone who is authorized by the copyright owner to use the copyrighted work in a way specified in the

> statute . . . is not an infringer of the copyright with respect to such use."

Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 433 (1984) (quoting 17 U.S.C. § 501(a)). Thus, "[t]he existence of a license creates an affirmative defense to a claim of copyright infringement." *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d 1110, 1114 (9th Cir. 2000). However, "[w]hen a licensee exceeds the scope of the license granted by the copyright holder, the licensee is liable for infringement." *LGS Architects, Inc. v. Concordia Homes of Nev.*, 434 F.3d 1150, 1156 (9th Cir. 2006).

As Rimini itself did not have a license to copy or to modify from Oracle, the success of Rimini's affirmative defense turns on whether Rimini's accused acts came within the scope of licenses held by its customers.

a) Software Licenses

The pertinent provisions of the J.D. Edwards and Siebel licenses are excerpted below:

J.D. Edwards	"Customer shall not, or cause anyone else to . . . (iii) copy the Documentation or Software except to the extent necessary for Customer's archival needs and to support the Users."
Siebel	"Customer" may "reproduce, exactly as provided by [Oracle], a reasonable number of copies of the Programs and the Ancillary Programs solely for archive or emergency back-up purposes or disaster recovery and related testing."

Like the language of the licenses themselves, the district court's constructions of the two licenses when instructing the jury were similar.

The district court told the jury that it was permissible for Rimini, as a third-party, to make copies of the Oracle software to support its customers by archiving, backup, and related testing. At the same time, the district court instructed that the licenses "do[] not mean that a third party like Rimini Street is authorized to make copies of the . . . software application . . . to use the customer's software . . . to support other customers."

b) Accused Acts

(1) Background

Work produced by humans is rarely if ever perfect, and computer software is no exception. Even casual users of computers are familiar with regular software patches and updates intended to correct glitches and to modify software in light of changing circumstances.

However, unlike the off-the-shelf consumer software used by individuals in everyday life, enterprise software employed by large organizations is customized around the organizations' specific needs. While producers of consumer software generally design updates around standard use cases and make them available for end users to download and install directly, updates to enterprise software must be tested and modified to fit with bespoke customizations before being put to actual use.

This testing process requires the creation of "development environments." A "development environment," sometimes called a "sandbox," is distinct from

a "production environment," which is the "live" version of the software that members of the enterprise ultimately deploy. As the district court explained:

> In order to develop and test software updates for Enterprise Software, support service providers . . . create development environments of the software. A development environment is a software environment that contains a copy of the software program which is then modified to develop and test software updates. Given the critical nature of Enterprise Software programs, updates to the software must be fully tested and verified in a development environment before they are provided to a customer.

Oracle USA, Inc. v. Rimini St., Inc., 6 F. Supp. 3d 1086, 1092 n.4 (D. Nev. 2014) (*"Oracle I"*).

In other words, the very work of maintaining customized software requires copying the software, which without a license to do so is a violation of the exclusive right of the copyright owner. Here, it is undisputed that the licenses generally permit Oracle's licensees to maintain the software and make development environments for themselves. However, some licensees of the software, lacking either the capability or the interest, opt to outsource the work of maintenance to others, such as Rimini or even Oracle itself.

(2) "Direct Use" and "Cross Use"

Oracle alleges that Rimini engaged in two distinct types of copyright infringement with respect to J.D. Edwards and Siebel. The first has to do with the way it created development environments, under col-

or of a license held by these particular, identifiable customers of Rimini, for that specific customer. We refer to this as "direct use."

The second is "cross use."[3] "Cross use," generally speaking, is the creation of development environments, under color of a license of one customer, to support *other* customers. There are numerous forms of "cross use." In its narrowest form, "cross use" is the making of development environments, under color of a license held by one identifiable customer of Rimini, for another identifiable customer of Rimini that also holds a license. It also may include the creation of development environments under a given license for other customers of Rimini that may themselves hold licenses or even for licensees who have yet to become customers of Rimini. Rimini claims that "cross use" is not infringement, arguing that it may create environments without restriction because any organization that might hire Rimini to service its software would itself have a license to create development environments. Rimini's counsel explained at oral argument that "cross use" enabled it to reduce expense by reusing work it had done for one customer in providing service to others.

c) Analysis

Rimini argues on appeal that the jury instructions were erroneous because they suggested that

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[3] Rimini offered this description of its "cross use" in its closing statement to the jury: "If we have multiple clients with the exact same release, the same rights, we would come up with one fix and then apply it to other customers that had the exact same rights. That's the cross-use, the reusing of updates that you've heard about in this case."

certain direct uses and cross uses were prohibited while Rimini believes they were permitted.

With respect to "direct use," we may dispose quickly of Rimini's claim that the district court construed "direct use" out of the licenses. Rimini successfully persuaded the district court to include the language, "to support the customer's use," in its jury instruction about the J.D. Edwards license. The instruction concerning Siebel told the jury specifically that Rimini could hold copies of the Siebel software application "solely for customer's archive or emergency back-up purposes or disaster recovery and related testing." Rimini did not object to that instruction at trial, and, contrary to Rimini's arguments on appeal, those instructions treated these forms of direct use as permitted.

Rimini also argues, however, that the instructions should have approved expressly of other forms of direct use. The district court had no reason or need to instruct the jury that the licenses permitted other types of direct use, because, as the district court's order shows, Rimini had represented that the only forms of direct use it engaged in were those allowed by the instruction:

> Rimini has proffered evidence that the development environments associated with [specific Siebel licensee] are used exclusively for archival and back-up purposes, and related testing, as directly contemplated by [the license].

Oracle I, 6 F. Supp. 3d at 1105 n.20; *see also id.* at 1103 (similar findings concerning J.D. Edwards). Had Rimini wanted a broader construction, Rimini should have said so in district court. Having failed to

do that, Rimini cannot complain that the jury found that Rimini's direct use with respect to J.D. Edwards and Siebel exceeded the scope of the licenses.

With respect to "cross use," Rimini's assertion—made for the first time in its reply brief to us—that "cross use" is a contractual rather than a copyright issue is not properly before us. The principal case on which Rimini relies, *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 629 F.3d 928 (9th Cir. 2011), was not cited in Rimini's opening brief, and "on appeal, arguments not raised by a party in its opening brief are deemed waived," *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).[4]

As to the substance of its position, Rimini argues that, contrary to the jury instructions, the licenses in fact permit "cross use." It observes that: 1) each of Rimini's customers had its own license; 2) each license permits copies to be made for archival and support purposes; 3) the licenses authorize the customers to outsource the archival and support work to third parties; and 4) such archival and support work includes the creation of development environments. Rimini dismisses evidence showing that it created development environments for future customers using the license of an existing customer on the basis that future customers presumably would have licenses that would permit them to hire Rimini to create development environments.

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[4] Even if we were to consider the applicability of *MDY Industries*, that case teaches specifically the distinction between "conditions," "the breach of which constitute copyright infringement," and "covenants," "the breach of which is actionable only under contract law." 629 F.3d at 939. Rimini has offered no analysis as to which terms of the licenses at issue are "conditions" and which are "covenants."

Oracle properly responds that each of the licenses at issue here "pointedly limits copying and use to supporting the '*Licensee*.'" The licenses do not authorize Rimini to "develop products *Rimini* could sell for *Rimini's* financial gain." Any work that Rimini performs under color of a license held by a customer for other existing customers cannot be considered work in support of that particular customer. The same logic applies to work Rimini performs for unknown, future customers. The licensees may hire a third party such as Rimini to maintain their software for them, but nothing in the licenses permits them to grant a nonparty to the license a general right to copy proprietary software.

2. Copyright Misuse

We turn next to the question of copyright misuse, which Rimini asserts as a defense. The copyright misuse doctrine prevents holders of copyrights "from leveraging their limited monopoly to allow them control of areas outside the monopoly." *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1157 (9th Cir. 2011). (quoting *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001)) (internal quotation marks omitted). To that end, while it "does prevent copyright holders from using the conditions to stifle competition," "[t]he copyright misuse doctrine does not prohibit using conditions to control use of copyrighted material." *Id.* at 1159. Accordingly, the doctrine is to be "applied . . . sparingly"; specifically, it operates when copyright holders attempt to impose license agreements that would "prevent[] . . . licensee[s] from using *any other competing product*." *Id.* at 1157 (emphasis added).

Rimini claims that holding it liable for copyright infringement would condone misuse of Oracle's copyright. In Rimini's view, the district court's pretrial construction of the licensing terms, as embodied in the jury instructions, "would foreclose competition in the aftermarket for third-party maintenance" because it would limit copies made by third parties to those made only for archival and emergency backup purposes and because the software could not be serviced simply by making exact copies. Oracle counters that the licenses "plainly do not preclude third parties from developing competing software or providing competing support services," but instead "require third parties to do so in ways that do not disregard Oracle's exclusive rights under copyright law."

We agree with Oracle. The district court did not construe the licenses to permit only archival and emergency backup purposes. For example, the jury instructions as to J.D. Edwards stated specifically:

> If you find that the copies of the J.D. Edwards software application . . . housed on Rimini Street's servers were used solely for the customer's archival needs and *to support the customer's use*, then that use is authorized by the J.D. Edwards software license agreement . . . .

The district court gave similar instructions as to Siebel. ("[Y]ou are informed that the court has ruled as a matter of law that the Siebel software license agreements authorized . . . Rimini Street to make a reasonable number of copies . . . solely for the customer's archive or emergency back-up purposes or disaster recovery *and related testing*." (emphasis added)). These constructions would not preclude Ri-

mini from creating development environments for a licensee for various purposes *after* that licensee has become a customer of Rimini.

The only remaining question is whether it would be copyright misuse to forbid Rimini from creating development environments for licensees *before* they have become customers or, in other words, whether it would contravene the policy of the Copyright Act to allow Oracle, as a copyright holder, to have a head start in making copies. The Supreme Court has held that "the right of first publication" is "an important marketable subsidiary right." *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985). Just as a copyright holder has the "right of first publication," it also must enjoy the right of "first copy." Giving a head start to Oracle in creating development environments is entirely consistent with the Supreme Court's teaching in *Harper*.

C. PeopleSoft

The district court granted summary judgment on Oracle's copyright claim with respect to PeopleSoft. "This Court reviews a district court's grant of summary judgment de novo. The Court must 'determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law.'" *Mitchell v. Washington*, 818 F.3d 436, 441–42 (9th Cir. 2016) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc)).

Rimini again asserts an express license defense and contends that it would be copyright misuse to hold it liable for infringement. Again, its arguments are without merit.

1. Express License Defense

The PeopleSoft license is similar to its J.D. Edwards and Siebel counterparts, but it contains an additional limitation about "[the licensee's] facilities":

PeopleSoft[5]	"Licensee may . . . make a reasonable number of copies of the Software, solely for: (i) use in accordance with the terms set forth herein . . . ; (ii) archive or emergency back-up purposes; and/or (iii) disaster recovery testing purposes[.]" "PeopleSoft grants Licensee a . . . license to use the licensed Software, solely for Licensee's internal data processing operations at its facilities[.]"

Based on this limitation, the district court construed the PeopleSoft license more restrictively than the J.D. Edwards and Siebel licenses. Specifically, it stated that "[the PeopleSoft license] expressly limits copying the licensed software to only the [licensee's] facilities." *Oracle I*, 6 F. Supp. at 1097 (emphasis omitted).

Because of the difference in the construction of the pertinent licenses, the nature of Oracle's claim concerning PeopleSoft is somewhat different in char-

[5] Two different PeopleSoft licenses are at issue here, one belonging to the City of Flint and the other to the Pittsburgh Public Schools. The district court concluded that the two licenses have "similar" language. *Oracle I*, 6 F. Supp. 3d at 1100. On appeal, the parties make no distinction between the two licenses; the language discussed here is drawn from the license held by the City of Flint.

acter from those concerning J.D. Edwards and Siebel. Specifically, the accused act concerning PeopleSoft is the creation of development environments, whether for "direct use" or "cross use," on Rimini's own computers, as opposed to the licensees' computers. Rimini describes this practice as "local hosting," a term that we adopt in this opinion. Rimini asserts that it does this to avoid transmission delays.

In the words of the district court, "it is undisputed that Rimini made copies of the licensed software at its own facilities and *outside the control* of the [customers]." *Id.* at 1101 (emphasis added). The district court concluded that the PeopleSoft licenses of Rimini's customers "do[] not authorize Rimini's offsite copies of the licensed software," and therefore granted summary judgment to Oracle on the copyright infringement claims as to PeopleSoft. *Id.* at 1097.

On appeal, Rimini contends that "[a licensee's] facilities" can span Rimini's own servers. In its words:

> Sophisticated companies like Oracle's customers (and Rimini's clients) do not keep all their servers on the actual premises of their principal place of business . . . . They may own some, lease others, and contract with third parties for still more capacity. All are encompassed within the plain meaning of "facilities."

We agree with Oracle that "facilities under the control of a third party" could not qualify as "the *licensee*'s facilities." It was not only sensible but also necessary for the district court to read a requirement

of "control" into the definition of "[a licensee's] facilities." The record supports the district court's conclusion that the Rimini servers where the copying took place were "outside the control of the [customers]." *Id.* at 1101. Indeed, Rimini made no showing that its customers had even constructive control of the servers.[6]

2. Copyright Misuse

As just explained, the district court concluded that Rimini infringed the PeopleSoft copyright by "local hosting," that is, by maintaining copies of PeopleSoft on its own computers as opposed to its customers' computers. *Oracle I*, 6 F. Supp. 3d at 1097. Rimini offers no argument as to why a restriction on the location of copies would stifle competition and run afoul of the copyright misuse doctrine. *Id.* Rimini's inability to "local host" may result in inconvenience and expense on its part, but that restriction on its conduct does not amount to copyright misuse. Indeed, at oral argument, Rimini admitted that the restriction against "local hosting" was one it could overcome.

D. Database

The district court also granted summary judgment for Oracle on the Database copyright infringement claim. It was undisputed that Rimini copied Oracle's copyright protected software when it built development, or non-production, environments for a number of Rimini customers using Oracle Database.

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[6] Because we address the question of infringement as to PeopleSoft on the narrow ground of "local hosting," we do not decide whether "direct use" or "cross use" was permitted by the PeopleSoft license.

Rimini's arguments on appeal with respect to Database are the same as those with respect to the other software at issue, except that here Rimini contends that its acts in fact were authorized by the Oracle License and Service Agreements ("OLSAs"). Oracle properly points out that Rimini has waived this point because it has failed to challenge the district court's legal conclusion that Rimini was not entitled to assert the OLSAs as a defense. Accordingly, we affirm the district court's determination of copyright infringement as to Database.

II. State Computer Law Claims

A. The CDAFA and the NCCL

The CDAFA is California's computer abuse law. It states, in relevant part, that:

> any person who commits any of the following acts is guilty of a public offense:
>
> . . . .
>
> (2) Knowingly accesses and without permission takes, copies, or makes use of any data from a computer, computer system, or computer network, or takes or copies any supporting documentation, whether existing or residing internal or external to a computer, computer system, or computer network.
>
> (3) Knowingly and without permission uses or causes to be used computer services.

CAL. PENAL CODE § 502(c). It provides a cause of action to "the owner or lessee of the computer, computer system, computer network, computer program, or

data who suffers damage or loss by reason of a violation." *Id.* § 502(e)(1).

The NCCL is Nevada's counterpart to the CDAFA. In relevant part, it provides that "a person who knowingly, willfully and without authorization: (a) Modifies; (b) Damages; (c) Destroys; (d) Discloses; (e) Uses; (f) Transfers; (g) Conceals; (h) Takes; (i) Retains possession of; (j) Copies; (k) Obtains or attempts to obtain access to, permits access to or causes to be accessed; or (l) Enters data, a program or any supporting documents which exist inside or outside a computer, system or network" or "who knowingly, willfully and without authorization: (a) Destroys; (b) Damages; (c) Takes; (d) Alters; (e) Transfers; (f) Discloses; (g) Conceals; (h) Copies; (i) Uses; (j) Retains possession of; or (k) Obtains or attempts to obtain access to, permits access to or causes to be accessed, a computer, system or network" is guilty of a misdemeanor. NEV. REV. STAT. § 205.4761(1), (3). The NCCL also provides a civil cause of action to "[a]ny victim of [such a misdemeanor]." *Id.* § 205.511(1).

B. Accused Acts

The ultimate question as to whether Rimini and Ravin (referred to collectively in this section as "Rimini") violated the state computer laws by downloading content from Oracle's website was submitted to the jury, which found in favor of Oracle. In denying Rimini's renewed motion for judgment as a matter of law, the district court observed that Oracle had for some time "encouraged its customers to use automated downloading tools as a means to obtain" large numbers of customer support files in a timely manner. *Oracle USA, Inc. v. Rimini St., Inc.*, 191 F. Supp. 3d 1134, 1139 (D. Nev. 2016) ("*Oracle III*").

Rimini had been doing just that when, "in response to an increased volume of mass downloads through the use of automated tools, and other server and database pressures, Oracle America changed its website's Terms of Use to specifically prohibit the use of 'any software routines commonly known as robots, spiders, scrapers, or any other automated means to access [the site] or any other Oracle accounts, systems or networks,' a change which "prohibited the use of previously allowed automated downloading tools." *Id.* at 1139–40 (alteration in original). The evidence showed that, in response, Rimini stopped using automatic downloading tools for about a year but then "began reusing automated tools on the website in violation of the Terms of Use (terms which it had to specifically agree to when logging on to the website) in order to download full libraries of support documents and files for entire software products lines—each involving hundreds of thousands of different files." *Id.* at 1140.

C. Positions of the Parties

Rimini and EFF contend that the statutory language "without permission" should not be read in a way that criminalizes violation of a website's terms of use. As EFF puts it, "[n]either statute . . . applies to bare violations of a website's terms of use—such as when a computer user has permission *and* authorization to access *and* use the computer or data at issue, but simply accesses or uses the information in a manner the website owner does not like."

Oracle, on the other hand, urges us to read the state statutes as not requiring unauthorized access for a violation, which appears to be how the district court construed them. *See id.* at 1143–44 (holding that Rimini's "claim that they had permission from

their clients to access Oracle['s] . . . website is irrelevant" under the state statutes).

D. Analysis

We review the denial of Rimini's motion for judgment as a matter of law de novo. *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1066 (9th Cir. 2016) (en banc).

The district court treated the two statutes as essentially identical, and for purposes of this appeal, we will take the CDAFA as representative. As the district court observed, "[w]hile the case law on the NCCL is limited, the statute covers the same conduct as the CDAFA and the same legal reasoning should apply." *Oracle III*, 191 F. Supp. 3d at 1144. The parties appear to agree with this approach; indeed, their arguments about liability do not differentiate between the two statutory schemes.

Here, there is no question that Rimini "t[ook]" and "m[ade] use of" "data." *See Oracle III*, 191 F. Supp. 3d at 1143 ("Nor do defendants contest that they took and subsequently used data from the website . . . ."). Nor is there any dispute that Oracle permitted some degree of access and taking from its website. *Id.* at 1139–40. ("[Oracle America] owns and operates a website that . . . contains millions of technical support files . . . . [T]his online database was accessible through a website that required both the customer's unique [login] and acceptance of the website's specific Terms of Use." (footnote omitted)). The central issue here is whether, by using automated tools to take data in direct contravention of Oracle's terms of use, Rimini violated the statutes.

We hold that taking data using *a method* prohibited by the applicable terms of use, when the taking

itself generally is permitted, does not violate the CDAFA. Because the same reasoning applies to the NCCL claim, we reverse the judgment as to both claims.

Oracle obviously disapproved of the method—automated downloading—by which Rimini took Oracle's proprietary information. But the key to the state statutes is whether Rimini was authorized in the first instance to take and use the information that it downloaded. *See United States v. Christensen*, 828 F.3d 763, 789 (9th Cir. 2015) (emphasis added) ("A plain reading of the [CDAFA] demonstrates that *its focus is on unauthorized taking or use of information.*").

Because it indisputably had such authorization, at least at the time it took the data in the first instance, Rimini did not violate the state statutes. This result is consistent with our decision in *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1069 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 313 (2017) (affirming the district court's holding that the defendant violated the CDAFA on the ground that the defendant "*without permission* took, copied, and made use of [the downloaded] data" (emphasis added)).

III. Violation of California's Unfair Competition Law

A violation of California's UCL occurs where there is a predicate offense, one of which is a violation of the CDAFA. CAL. BUS. & PROF. CODE § 17200. The district court granted judgment in favor of Oracle on its UCL claim based on its finding that Rimini and Ravin had violated the CDAFA. Because we reverse as to the CDAFA claim, we also reverse the district court's determination that Rimini and Ravin violated the UCL.

IV. Damages[7]

The jury awarded a total of $14,427,000 to two Oracle subsidiaries based on Rimini's alleged violation of the CDAFA and NCCL. Because we have concluded that Rimini did not violate those laws, we reduce damages by this amount.

V. Prejudgment Interest

We review a district court's decision to award prejudgment interest for abuse of discretion. *Barnard v. Theobald*, 721 F.3d 1069, 1075 (9th Cir. 2013). We also review the rate used by the district court to calculate the prejudgment interest for abuse of discretion. *Blankenship v. Liberty Life Assurance Co. of Bos.*, 486 F.3d 620, 628 (9th Cir. 2007).

The district court awarded $22,491,636.16 in prejudgment interest on the copyright claims and $5,279,060.12 in prejudgment interest on the NCCL claims. Because we have concluded that Rimini did not violate the NCCL, we reverse as to the latter amount. For the reasons discussed below, we affirm as to the former.

We have held that "[g]enerally, 'the interest rate prescribed for post-judgment interest under 28 U.S.C. § 1961 is appropriate for fixing the rate of prejudgment interest unless the trial judge finds, on substantial evidence, that the equities of that particular case require a different rate.'" *Blankenship*, 486 F.3d at 628 (quoting *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1164 (9th Cir. 2001)).

The district court calculated its award of $22,491,636.16 based upon the Treasury rate on the

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[7] Rimini does not challenge the amount of the jury's award of $35,600,000 in damages for copyright infringement.

date infringement began, that is, 5.07% in October 2006, rather than on the "starting point" set forth in 28 U.S.C. § 1961, that is, 0.61% in October 2016. The district court explained its deviation from the normal rate, which resulted in a difference of approximately $20,000,000, as follows:

> [T]he court finds that there is good cause to set the prejudgment interest rate at the Treasury rate on the date infringement began, rather than at the time of judgment. The court makes this finding because of the nature of the jury's award of hypothetical license damages. As the jury awarded damages to Oracle in an amount it would have received from Rimini for licensing Oracle's software at the time it began infringing Oracle's copyrights in late 2006, the court finds that this is the relevant time period for prejudgment interest. After this date, when Rimini began infringing Oracle's copyrights, Oracle lost out on the licensing fees it would have received, absent infringement. It is not equitable in the court's view to allow defendants to reap a windfall by the lower interest rates that are now available simply because they engaged in discovery delays and other litigation tactics (addressed more thoroughly in Oracle's motion for attorneys' fees) that kept this action in litigation for several years. Therefore, the court shall . . . set the appropriate rate for prejudgment interest under the Copyright Act as the weekly average one-year constant ma-

> turity Treasury yield at the start of the infringement.

Despite these specific findings, Rimini asserts that the district court failed to make the "exceptional case" determination that would permit it to depart from the presumptive rate set forth in 28 U.S.C. § 1961. It contends that the district court may not set the interest rate based on a defendant's bad behavior, citing our holding in *Dishman v. UNUM Life Insurance Co. of America* for the proposition that, "[a]lthough a defendant's bad faith conduct may influence whether a court awards prejudgment interest, it should not influence the rate of the interest." 269 F.3d 974, 988 (9th Cir. 2001). Rimini also asserts that the 0.61% adequately represents market rates and fully compensates Oracle's loss.

It is true that "prejudgment interest is an element of compensation, not a penalty." *Barnard*, 721 F.3d at 1078. Rimini is correct that it would have been improper for the district court to set a higher rate based on Rimini's litigation conduct alone. But considering the district court's analysis in its totality, it is apparent that the rate was based primarily on the jury's award of copyright damages based on a hypothetical license, making it appropriate to approximate the licensing fees that Oracle "lost out on" and "would have received, absent infringement" by using the Treasury rate on the date of infringement.

The district court made an extensive and detailed record throughout many years of complex and contentious litigation. Its understandable frustration with Rimini's litigation conduct is apparent in some of the orders now before us. However, there is ample evidence in the record to support the court's award of prejudgment interest at the Treasury rate on the

date infringement began. We find no abuse of discretion.

VI. Injunctive Relief

> As to [a] permanent injunction, we review the legal conclusions de novo, the factual findings for clear error, and the decision to grant a permanent injunction, as well as its scope, for an abuse of discretion. To review for abuse of discretion, "we first look to whether the trial court identified and applied the correct legal rule . . . [then] to whether the trial court's resolution of the motion resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record."

Columbia Pictures Indus., Inc. v. Fung, 710 F.3d 1020, 1030 (9th Cir. 2013) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc)).

The district court entered permanent injunctions against Rimini based on copyright infringement and against Rimini and Ravin based on alleged violations of the CDAFA.[8] We stayed both injunctions pending resolution of this appeal.

In view of our conclusion that there was no violation of the state computer laws, we reverse as to the CDAFA injunction. As explained below, we vacate

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[8] The injunction entered by the district court is clearly divided into separate portions. We therefore treat the injunction as if there were two separate injunctions.

the copyright injunction and remand for reconsideration in light of our opinion.

The Supreme Court established a four-factor test that must be applied before a district court may grant a permanent injunction. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Here, the district court assessed the four factors by reference to *both* the copyright and the CDAFA claims, without considering separately the propriety of issuing an injunction as to the copyright claims alone. For example, the court concluded that Rimini's "violations of state computer access statutes" contributed to an "irreparable injury" to Oracle's business reputation and goodwill.

Based on the record before us, we do not know how the district court would weigh the *eBay* factors with respect to the copyright claims alone. We express no view on the propriety or scope of any injunctive relief, which are matters committed to the district court's discretion in the first instance.

VII. Fees

"We review the award of fees and costs for abuse of discretion, but will overturn it if it is based on an erroneous determination of law." *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006).

The district court awarded $28,502,246.40 in attorneys' fees to Oracle. It concluded that this award was appropriate under the fee-shifting provisions of the Copyright Act and the state computer laws. Although Ravin was not found liable for copyright infringement, the district court decided that Ravin was, along with Rimini, "severally and equally" liable

for the award because he had violated the state computer statutes.

In view of our conclusion that there was no violation of the state computer laws, we reverse the judgment with respect to Ravin's liability for fees. As to Rimini, we vacate the fee award and remand for reconsideration in light of Oracle's more limited success at litigation.

VIII. Costs

A. Taxable Costs

The district court awarded Oracle $4,950,566.70 in taxable costs. Rimini originally asked us to reduce this award by approximately $1,700,000, contending that Oracle only requested roughly $3,200,000 in taxable costs in the district court. Oracle conceded that approximately $1,500,000 in non-taxable costs improperly was counted as taxable. About $200,000 remains in dispute.

The district court's cost award apparently was based on the following chart it received from Oracle:

Attorneys' Fees	**Dkt. 926, Ex. 1**	**Adjustments**	**Final**
Bingham and Morgan Lewis	$18,695,129.67[1]		$18,695,129.67
Boies Schiller	$12,542,840.00[2]	*-$6,480.00*[3]	$12,536,360.00
H5 & Huron	$4,360,943.20[4]		$4,360,943.20

Attorneys' Fees	**Dkt. 926, Ex. 1**	**Adjustments**	**Final**
Other (Black Letter, Barg Coffin)	$28,895.12[5]		$28,895.12
TOTAL ATTORNEYS' FEES	$35,627,807.99		**$35,621,327.99**
Taxable Costs			
Deposition Costs	$192,999.706		$192,999.70
Stroz Fees for Oracle Productions	$4,757,561.00[7]	*-$1,515,279.45*[8]	$3,242,281.55
TOTAL TAXABLE COSTS	$4,950,560.70		**$3,435,281.25**

The district court evidently read the wrong column when it awarded $4,950,566.70 in taxable costs. Given the parties' agreement that Oracle is entitled to about $3,200,000 in taxable costs, the remaining dispute involves $192,999.70 in deposition costs. Because Rimini's briefs articulate no basis for our doing so, we do not disturb the district court's inclusion of these expenses in the taxable cost award. We thus reduce the award to $3,435,281.25.

B. Non-taxable Costs

Title 17 U.S.C. § 505 provides:

> In any civil action under [the Copyright Act], the court in its discretion may al-

> low the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

By contrast, 28 U.S.C. § 1920 identifies only six categories of costs that are taxable against the losing party.

In *Twentieth Century Fox v. Entertainment Distribution*, we held that, because 17 U.S.C. § 505 permits the award of *full* costs, the award of costs under § 505 is not limited to the categories of costs described in 28 U.S.C. § 1920. 429 F.3d 869, 885 (9th Cir. 2005). Here, relying expressly on *Twentieth Century Fox*, the district court awarded Oracle $12,774,550.26 in non-taxable costs.

Rimini contends that *Twentieth Century Fox* has been abrogated by *Marx v. General Revenue Corp.*, 568 U.S. 371 (2013), and that, accordingly, the district court erred. We disagree.

We are bound by our precedent unless the theory or reasoning of the decision is "clearly irreconcilable" with a higher intervening authority, such as a decision by the Supreme Court. *Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc). Our decision in *Twentieth Century Fox* concerned the relationship between 17 U.S.C. § 505 and 28 U.S.C. § 1920. The Supreme Court's decision in *Marx* concerned neither statute. Instead, the Court held that 15 U.S.C. § 1692k(a)(3) is not contrary to the costs provision in Federal Rule of Civil Procedure 54(d)(1).

Nothing in *Marx* is clearly irreconcilable with *Twentieth Century Fox*.

The parties shall bear their own costs on appeal.

AFFIRMED in Part, REVERSED in Part, VACATED and REMANDED in Part.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ORACLE USA, INC., a Colorado corporation; ORACLE AMERICA, INC., a Delaware corporation; ORACLE INTERNATIONAL CORPORATION, a California corporation,

Plaintiffs-Appellees,

v.

RIMINI STREET, INC., a Nevada corporation; SETH RAVIN, an individual,

Defendants-Appellants.

FILED
MAR 02 2018
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Nos. 16-16832
16-16905

D.C. No.
2:10-cv-00106-LRH-VCF

ORDER

Before: GRABER and FRIEDLAND, Circuit Judges, and FOGEL,[1] District Judge.

Judges Graber and Friedland have voted to deny the petition for rehearing en banc for Appellant Ri-

[1] The Honorable Jeremy D. Fogel, United States District Judge for the Northern District of California, sitting by designation.

mini Street, Inc., and Judge Fogel has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

The petition for rehearing en banc for Appellant Rimini Street, Inc., is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ORACLE USA, INC., a Colorado corporation; ORACLE AMERICA, INC., a Delaware corporation; and ORACLE INTERNATIONAL CORPORATION, a California corporation, Plaintiffs, v. RIMINI STREET, INC., a Nevada corporation; AND SETH RAVIN, an individual, Defendants.	Case No. 2:10-cv-0106-LRH-VCF **FED. R. CIV. P. 58 FINAL JUDGMENT IN A CIVIL ACTION**

Whereas this action was tried by a jury with the Hon. Larry R. Hicks presiding, and the jury rendered a verdict on October 13, 2015, and whereas further matters were heard by Judge Hicks and a decision was rendered on September 21, 2016, it is hereby **ORDERED, ADJUDGED, and DECREED**:

That Defendant Rimini Street, Inc. shall pay Plaintiff Oracle International Corporation the amount of $58,299,437.61 (representing $35,600,000 plus $22,691,741.52 in prejudgment interest through October 17, 2016 plus $7,696.36 for each additional

day after October 17, 2016 until judgment is entered);

That Defendants Rimini Street, Inc. and Seth Ravin shall pay Plaintiff Oracle International Corporation the amount of $ 7,671,846.99 (representing $5,600,000 plus $2,071,005.46 in prejudgment interest through October 17, 2016 plus $841.53 for each additional day after October 17, 2016 until judgment is entered);

That Defendants Rimini Street, Inc. and Seth Ravin shall pay Plaintiff Oracle America, Inc. the amount of $12,092,748.86 (representing $8,827,000 plus $3,264,422.40 in prejudgment interest through October 17, 2016 plus $1,326.46 for each additional day after October 17, 2016 until judgment is entered);

That Defendants Rimini Street, Inc. and Seth Ravin shall pay Plaintiffs Oracle America, Inc., and Oracle International Corporation attorneys' fees and costs in the amount of $46,227,363.36;

That Defendants Rimini Street, Inc. and Seth Ravin shall pay postjudgment interest on all amounts specified herein at the rate described in 28 U.S.C. § 1961 from the date of entry through the date of payment; and,

That Defendants Rimini Street, Inc. and Seth Ravin are enjoined in accordance with the permanent injunction set forth at ECF No. 1065.

SO ORDERED.

DATED this 18th day of October, 2016.

LANCE S. WILSON, CLERK

/s/
BY: Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
****** DISTRICT OF NEVADA**

ORACLE USA, INC., et al.,	JUDGMENT IN A CIVIL CASE
Plaintiff,	CASE NUMBER: 2:10-cv-00106-LRH-PAL
v.	
RIMINI STREET, INC., et al.	
Defendants.	

___ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

X **Decision by Court**. This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED an award of attorneys' fees and costs is hereby entered in favor of Plaintiffs Oracle USA, Inc.; Oracle America, Inc.; and Oracle International Corporation and against Defendants Rimini Street, Inc. and Seth Ravin in the amount of $46,227,363.36.

September 21, 2016

LANCE S. WILSON
Clerk

/s/ K. Walker
Deputy Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ORACLE USA, INC., a Colorado corporation; ORACLE AMERICA, INC., a Delaware corporation; and ORACLE INTERNATIONAL CORPORATION, a California corporation; Plaintiffs, v. RIMINI STREET, INC., a Nevada corporation; and SETH RAVIN, an individual; Defendants.	2:10-CV-00106-LRH-PAL ORDER

Before the court are plaintiffs Oracle USA, Inc.; Oracle America, Inc.; and Oracle International Corporation's (collectively "Oracle") motion for a permanent injunction (ECF No. 900), motion for prejudgment interest (ECF No. 910), and motion for attorneys' fees (ECF No. 917). Defendants Rimini Street, Inc. ("Rimini") and Seth Ravin ("Ravin") (collectively "defendants") filed oppositions to the motions (ECF Nos. 905, 958, 998) to which Oracle replied (ECF Nos. 907, 979, 1018).

I. Facts and Procedural History

This action has an extensive factual and procedural history. In brief, Oracle develops, manufactures, and licenses computer software. Oracle also provides software support services to customers who license its software. Defendant Rimini is a company that provides similar software support services to customers licensing Oracle's software and competes directly with Oracle to provide these services. Defendant Ravin is the owner and CEO of Rimini.

On January 25, 2010, Oracle filed a complaint for copyright infringement against defendants alleging that Rimini copied several of Oracle's copyright-protected software programs onto Rimini's own computer systems in order to provide software support services to its customers. ECF No. 1. In June 2011, Oracle filed a second amended complaint alleging thirteen causes of action against defendants: (1) copyright infringement; (2) violation of the Federal Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030(a); (3) violation of the California Computer Data Access and Fraud Act, Cal. Penal Code § 502; (4) violation of the Nevada Computer Crimes Law, NRS § 205.4765; (5) breach of contract; (6) inducement of breach of contract; (7) intentional interference with prospective economic advantage; (8) negligent interference with prospective economic advantage; (9) unfair competition; (10) trespass to chattels; (11) unjust enrichment; (12) unfair practices; and (13) accounting. ECF No. 146.

A jury trial was held on Oracle's claims from September 14 through October 13, 2015. On October 13, 2015, the jury returned its verdict and found that defendant Rimini engaged in copyright infringement of Oracle's copyrighted PeopleSoft, J.D. Edwards,

and Siebel-branded Enterprise Software products. ECF No. 896. The jury also found that both defendants Rimini and Ravin violated the California Computer Data Access and Fraud Act and the Nevada Computer Crimes Law. *Id.* Ultimately, the jury awarded Oracle $35,600,00.00 against Rimini for copyright infringement and awarded Oracle $14,427,000.00 against both Rimini and Ravin for violation of the state computer access statutes. *Id.* After the jury verdict, Oracle filed the present motions for a permanent injunction, prejudgment interest, and attorneys' fees. ECF Nos. 900, 910, 917. The court shall address each post-trial motion below.

II. Motion for Permanent Injunction (ECF No. 900)

As part of its motion for a permanent injunction, Oracle seeks three separate forms of relief. First, Oracle seeks judgment against defendants on its claim for violation of California's Unfair Competition Law. Second, Oracle seeks a permanent injunction to enjoin and restrain defendants from continued infringement of Oracle's copyrighted Enterprise Software products and from improperly accessing and taking data from Oracle's websites and computer systems. Finally, Oracle seeks disposition of all copies of the infringing software on defendants' systems.

A. California's Unfair Competition Law

Oracle seeks judgment against both defendants Rimini and Ravin on its claim for violation of California's Unfair Competition Law ("UCL"), Cal. Bus & Prof. Code § 17200 *et seq*. California's UCL prohibits unlawful, fraudulent, and unfair business practices. *Cel-Tech Comm's, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (Cal. 1992). There is no right to a

jury trial under the UCL. Rather, a violation of the UCL occurs as a matter of law when there has been a violation of a predicate act. CAL. BUS & PROF. CODE § 17200. A violation of the California Computer Data Access and Fraud Act is an identified predicate act under the UCL. *See Cal-Tech Comm's, Inc.*, 20 Cal. 4th at 180; CAL. BUS & PROF. CODE § 17500 *et seq*. Because the jury found that defendants violated the CDAFA, Oracle is also entitled to judgment against defendants on its UCL claim. Accordingly, the court shall grant Oracle's motion and issue judgment in favor of plaintiffs Oracle America, Inc. and Oracle International Corporation on this claim.

B. Permanent Injunction

"[T]he decision whether to grant or deny injunctive relief rests within the equitable discretion" of the district court. *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 394 (2006). Such discretion should be "exercised consistent with traditional principles of equity." *Id*. In determining whether to issue a permanent injunction in copyright infringement actions, courts evaluate four factors: (1) irreparable harm; (2) inadequacy of monetary damages; (3) the balance of hardships; and (4) whether the public interest would be served by a permanent injunction. *Id*. at 391; *see also Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 999 (9th Cir. 2011) (applying the four-factor test outlined in *eBay*). Further, an injunction should issue when the intervention of the court in equity is essential to protect a party's rights against injuries that could not otherwise be remedied. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

1. Availability of a Permanent Injunction

Before addressing whether to award Oracle an injunction in this action, the court must first determine whether Oracle is entitled to seek a permanent injunction against defendants and under what statute(s), if any.

Initially, Oracle contends that it may seek a permanent injunction under the Nevada Computer Crimes Law ("NCCL"). *See* NRS § 205.513(2) ("An injunction . . . [m]ay be issued without proof of actual damage sustained by any person."). However, under the NCCL, only the Nevada Attorney General or the appropriate district attorney may seek a permanent injunction against a party who has violated the act. NRS § 205.513(1) (stating that only the "Attorney General or the appropriate district attorney may file an action in any court of competent jurisdiction to prevent the occurrence or continuance of that act or practice."). Thus, the plain language of the statute does not authorize Oracle, a private party, to seek a permanent injunction for a violation of the NCCL.

Next, Oracle seeks a permanent injunction under the California Computer Data Access and Fraud Act ("CDAFA"). The CDAFA provides that the owner of a computer network, like Oracle, may seek injunctive relief for violations of the statute. CAL. PENAL CODE § 502(e)(1) ("In addition to any other civil remedy available, the owner or lessee of the computer, computer system, computer network, computer program, or data who suffers damage or loss by reason of a violation of any of the provisions of subdivision (c) may bring a civil action against the violator for compensatory damages and injunctive relief or other equitable relief."). Accordingly, Oracle is entitled to seek a

permanent injunction against defendants under the CDAFA.

Finally, Oracle contends that it is entitled to seek a permanent injunction under the Copyright Act. The Copyright Act provides that a district court may enter an injunction "on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. § 502(a). Therefore, the court finds that Oracle is entitled to separately seek a permanent injunction against defendant Rimini under the Copyright Act.[1]

2. Irreparable Injury

The first factor in a permanent injunction analysis is whether a plaintiff has suffered an irreparable injury as a result of a defendant's conduct, or will suffer an irreparable injury absent an injunction. *See American Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). As part of a court's irreparable injury analysis in a copyright action, courts regularly examine three factors: (1) direct competition between the parties; (2) loss of market share due to the infringement; and (3) loss of customer and business goodwill. *See, e.g., Presidio Components Inc. v. Am. Tech. Ceramics Corp.*, 702 F.3d 1351, 1362 (Fed. Cir. 2012) (stating that direct competition in the same market strongly supports the potential for irreparable harm absent an injunction); *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 861 (Fed. Cir. 2010) (finding that harm to a party's market share, revenues, and brand recognition is rele-

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[1] As the jury did not find that defendant Ravin engaged in any copyright infringement, Oracle may not separately seek a permanent injunction against Ravin pursuant to the Copyright Act.

vant for determining whether the party has suffered an irreparable injury); *Celsis in Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012) (holding that loss of goodwill, damage to reputation, and loss of business opportunities are all valid grounds for finding irreparable harm).

Here, the court finds that defendants' unlawful actions, to wit copyright infringement and violations of the state computer access statutes, irreparably injured Oracle's business reputation and goodwill. First, it is undisputed that Oracle and Rimini directly compete with each other to provide software support services and that Rimini infringed Oracle's copyrighted works, which supports issuance of a permanent injunction. *See Presidio Components, Inc.*, 702 F.3d at 1362.

Second, the evidence in this action established Rimini's callous disregard for Oracle's copyrights and computer systems when it engaged in the infringing conduct. For example, the evidence established that Rimini's egregious and continued infringement enabled it to rapidly build its business and gain market share against Oracle in the software support service market by offering cut-rate prices on its support services for Oracle software, generally at a discount of 50% of Oracle's prices for similar service contracts. In fact, Rimini's business model was built entirely on its infringement of Oracle's copyrighted software and its improper access and downloading of data from Oracle's website and computer systems, and Rimini would not have achieved its current market share and business growth without these infringing and illegal actions. Moreover, Rimini landed clients for its services by telling customers that Oracle's services were overpriced and could be provided at the

same rate Rimini was offering while still providing Oracle significant profits, thereby harming Oracle's business reputation. Through this misconduct, Rimini gained an improper advantage that it used to harm Oracle's business reputation and goodwill in the software service industry. Such injuries to a business' reputation and goodwill have consistently been held to constitute irreparable harm. *See Apple Inc. v. Psystar Corp. (Apple II)*, 658 F.3d 1150, 1154 (9th Cir. 2011).

Finally, Rimini's claim that it no longer engages in the conduct adjudged by the court and jury to infringe Oracle's copyrights is not a basis to deny issuance of an injunction. *See Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1222 (C.D. Cal. 2007) (stating that "[a] private party's discontinuation of unlawful conduct does not make the dispute moot, however. An injunction remains appropriate to ensure that the misconduct does not recur as soon as the case ends."). Therefore, the court finds that this factor weighs in favor of a permanent injunction.

3. Inadequacy of Monetary Damages

In order to establish that an injunction is warranted, a plaintiff must show that monetary damages are inadequate to fully compensate it for the defendant's conduct. *eBay*, 547 U.S. at 391. Here, the court finds that Oracle has established that monetary damages alone are inadequate to compensate it for the losses suffered because of defendants. First, the court notes that certain harms suffered by Oracle like lost market share and company goodwill are intangible injuries difficult to quantify and compensate. *See Apple II*, 658 F.3d at 1154 (stating that in-

juries to a business' reputation and company goodwill are intangible injuries difficult to quantify and compensate). Second, the infringement damages in this action were complex and difficult to determine. Unlike a patent case where a specific number of infringing products are sold at a specific price, in this copyright infringement action there was no efficient way to measure the damages Oracle suffered. In particular, the jury was provided with two separate damage theories, both of which required the jury to evaluate a substantial amount of evidence and expert testimony to reach the damages awarded in this action. Oracle's lost profits theory required the jury to determine the lost profits, if any, of a multi-billion dollar company that has a continuously growing business. Similarly, Oracle's hypothetical license damages theory required the jury to determine the amount Oracle would have charged for Rimini, its competitor in the software service market, to license its copyrighted software when presented with evidence that Oracle does not license its software to such competitors. The difficulty for the jury in determining damages in this action supports Oracle's claim that monetary damages alone are insufficient to fairly and fully compensate it for defendants' conduct. Finally, one of the most fundamental rights the holder of a copyright has is the right to exclude others, and this right has routinely been held difficult to compensate solely through monetary compensation. *See eBay*, 547 U.S. at 395 (Roberts, C.J. concurring) (identifying and explaining the difficulty of protecting a right to exclude through monetary remedies alone). Based on all the above, the court finds that this factor weighs in favor of an injunction.

4. Balance of Hardships

A court must weigh and balance the competing effect that granting or withholding an injunction would have on each party. *See Williams v. Bridgeport Music, Inc.*, 2015 U.S. Dist. LEXIS 97262, at *128 (C.D. Cal. 2015). The court has reviewed the documents and pleadings on file in this matter and finds that the balance of hardships weighs in favor of an injunction. Generally, the balance of hardships tips in favor of a holder of a copyright seeking to protect its copyrighted works, especially when the party to be enjoined does not have a separate legitimate business purpose for continuation of the infringing acts. *Grokster*, 518 F. Supp. 2d at 1220. This case is no different. First, Rimini does not have a separate legitimate business purpose for continuation of the infringing acts. Second, there is no evidence that Rimini would be harmed by an injunction that enjoins and restrains future copyright infringement or using the materials gained from its infringement because Rimini has already represented to the court that is has changed its business model and support services away from the infringing model in response to the court's orders on summary judgment. Finally, because Oracle seeks to enjoin only acts that have already been determined to be unlawful, the balance of hardships weighs in Oracle's favor.

5. Public Interest

"[T]he touchstone of the public interest factor is whether an injunction, both in scope and effect, strikes a workable balance between protecting the [copyright holder's] rights and protecting the public from the injunction's adverse effects." *i4i*, 598 F.3d at 863.

Here, having reviewed all the documents and pleadings on file in this matter, the court finds that an injunction against future copyright infringement and violations of the computer access statutes are in the public interest. *See Apple Comput. v. Franklin Comput. Corp.*, 714 F.2d 1240, 1255 (3d Cir. 1983) ("[I]t is virtually axiomatic that the public interest can only be served by upholding copyright protections and, correspondingly, preventing the misappropriation of the skills, creative energies, and resources which are invested in the protected work."). Further, an injunction against future infringement would not harm the public interest of access to competitive services because Rimini has repeatedly represented to the court that its current business model is not based on its prior infringing conduct. Taking defendants' statements as true, then Rimini's ability to compete against Oracle in the software support service market would not be lost with an injunction, and thus, the public would still have access to competition in that market. Finally, issuing an injunction in this action "ultimately serves the purpose of enriching the general public through access to creative works" by giving Oracle an incentive to continue to develop software for public use. *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1986 (2016). Therefore, the court finds that the relevant *eBay* factors favor issuance of a permanent injunction in this action, and the court shall grant Oracle's motion accordingly.

C. Disposition of Infringing Articles

In addition to a permanent injunction, Oracle seeks an order pursuant to the impoundment provisions of the Copyright Act either requiring defendants to turn over all infringing copies of Oracle's cop-

yrighted works to a neutral third party to be approved by the court or destroying all infringing copies outright, thereby preventing defendants from continuing to leverage the benefits of its infringing actions in its current business model. *See* ECF No. 900.

The Copyright Act provides that, "[a]s part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies or phonorecords found to have been made or used in violation of the copyright owner's exclusive rights." 17 U.S.C. § 503(b). A disposition order is "an equitable remedy issued under the broad powers vested in a trial judge under 17 U.S.C. § 503(b)." *Rogers v. Koons*, 960 F.2d 301, 313 (2d Cir. 1992). However, such seizure and impoundment orders are "extraordinary relief" solely within the discretion of the district court. *See Williams*, 2015 U.S. Dist. LEXIS 97262, at *131. Although the Ninth Circuit has not identified appropriate factors to consider in determining whether to issue impoundment, several courts have applied the same factors related to issuance of a permanent injunction. *See, e.g., Hounddog Prods., L.L.C. v. Empire Film Grp., Inc.*, 826 F. Supp. 2d 619, 633 (S.D.N.Y. 2011); *Bridgeport Music, Inc. v. Justin Combs Pub.*, 507 F.3d 470, 492 (6th Cir. 2007) (affirming a district court's order of impoundment upon consideration of the traditional injunction factors).

With respect to Oracle's proposed disposition order, the court finds that Oracle is not entitled to a separate order impounding Rimini's computers and media. Generally, disposition orders should be granted only where other legal remedies and compensatory damages do not provide adequate relief.

Here, however, Oracle has received monetary compensation for Rimini's infringement, and the court has found that a permanent injunction should be issued against defendants against future conduct. These remedies are sufficient to protect and compensate Oracle. Further, the requested outcome of Oracle's disposition remedy - preclusion of Rimini from using the infringing works - is achieved the same with a permanent injunction as it would be with a disposition order. Thus, having already found that Oracle is entitled to a permanent injunction, the court shall deny Oracle's request for a separate disposition order under Section 503(b).

III. Motion for Prejudgment Interest (ECF No. 910)

Oracle also seeks an award of prejudgment interest on the jury verdict. Prejudgment interest is "statutorily prescribed interest accrued either from the date of the loss or from the date when the complaint was filed up to the date the final judgment is entered. . . . Depending on the statute, it may or may not be an element of damages." *Prejudgment interest, Black's Law Dictionary* (10th ed. 2014). The purpose behind prejudgment interest is "to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered." *Barnard v. Theobald*, 721 F.3d 1069, 1078 (9th Cir. 2013). Whether to award prejudgment interest under an applicable statute is in "the district court's sound discretion." *Id.*

Initially, Oracle seeks prejudgment interest under the Copyright Act on the jury's award of $35.6 million in damages against defendant Rimini for copyright infringement. *See* ECF No. 910. An award of prejudgment interest is an available statutory

remedy under the Copyright Act. *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 716 (9th Cir. 2004). In the Ninth Circuit, the starting point for federal prejudgment interest is the post-judgment rate established by 28 U.S.C. § 1961, which is the weekly average of the one-year constant maturity Treasury yield. *See Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 836-37 (9th Cir. 2012) (en banc), *see also Williams*, 2015 U.S. Dist. LEXIS 97262, at * 144.

In its motion, Oracle seeks prejudgment interest at the higher Prime rate rather than the Treasury rate, contending that the Prime rate is sufficient to cover inflation over the lengthy infringement and litigation period. *See* ECF No. 910. Further, Oracle argues that the hypothetical license measure of damages and the equities considered in a copyright case - compensation to the plaintiff, deterring infringers, and preventing unjust enrichment of the defendant - weigh strongly in favor of a market-based rate higher than the Section 1961 Treasury rate. The court disagrees.

"[U]nless the district court concludes that the equities demand a different rate," an award of prejudgment interest in a copyright infringement case "should be based on the fifty-two week Treasury bill rate." *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1552-53 (9th Cir. 1989). Further, the Ninth Circuit has repeatedly held that the Section 1961 rate is the appropriate rate of prejudgment interest in an action for copyright infringement. *Price*, 697 F.3d at 836; *Williams*, 2015 U.S. Dist. LEXIS 97262, at * 144. Here, the court finds that there is no basis to deviate from the standard Treasury rate to the Prime rate in this action. That

being said, however, the court finds that there is good cause to set the prejudgment interest rate at the Treasury rate on the date infringement began, rather than at the time of judgment. The court makes this finding because of the nature of the jury's award of hypothetical license damages. As the jury awarded damages to Oracle in an amount it would have received from Rimini for licensing Oracle's software at the time it began infringing Oracle's copyrights in late 2006, the court finds that this is the relevant time period for prejudgment interest. After this date, when Rimini began infringing Oracle's copyrights, Oracle lost out on the licensing fees it would have received, absent infringement. It is not equitable in the court's view to allow defendants to reap a windfall by the lower interest rates that are now available simply because they engaged in discovery delays and other litigation tactics (addressed more thoroughly in Oracle's motion for attorneys' fees) that kept this action in litigation for several years. Therefore, the court shall grant Oracle's motion and set the appropriate rate for prejudgment interest under the Copyright Act as the weekly average one-year constant maturity Treasury yield at the start of the infringement.

Second, Oracle also seeks prejudgment interest under the CDAFA and the NCCL on the jury's award of $14.4 million in damages for violation of the state computer access statutes. Under California law, "a person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in the person upon a particular day, is entitled to also recover interest from that day." CAL. CIV. CODE § 3287(a). However, under California law, only damages that are "certain, or capable of being made certain by calculation" prior

to litigation may accrue prejudgment interest. *Duale v. Mercedez-Benz USA, LLC*, 148 Cal. App. 4th 718, 728-29 (2007). The "test for recovery of prejudgment interest under § 3287(a) is whether [the] defendant actually knows the amount owed or from reasonably available information could the defendant have computed that amount." *Id.* Further, "where the amount of damage, as opposed to the determination of liability, depends upon a judicial determination based upon conflicting evidence" Section 3287 "does not authorize prejudgment interest." *Id.* Here, the amount of damages for defendants' conduct under the CDAFA was not known or easily calculable prior to trial and required the jury to evaluate and weigh conflicting evidence. Therefore, the court finds that Oracle is not entitled to prejudgment interest under the CDAFA.

In contrast, in Nevada, prejudgment interest is a matter of statutory right. *Torres v. Goodyear Tire & Rubber Co.*, 317 P.3d 828, 830 (Nev. 2014) ("NRS 17.130 . . . provides a statutory right for interest on judgments."). Nevada law establishes a prejudgment interest rate of 2% plus "the prime rate at the largest bank in Nevada ascertained by the Commissioner of Financial Institutions on January 1 or July 1, as the case may be, immediately preceding the date of judgment." NRS §17.130. Such interest is assessed as simple interest on an annual basis. *Torres*, 317 P.3d at 830-31. Further, under Nevada law, interest is drawn "from the time of service of the summons." *Sobel v. Hertz*, 291 F.R.D. 525, 544 (D. Nev. 2013). Here, the summons in this action was served on January 27, 2010. Thus, the court finds that Oracle is entitled to prejudgment interest at the Nevada statutory rate for the $14.4 million in damages for

violation of the NCCL starting January 27, 2010, through the date of judgment.

IV. Motion for Attorneys' Fees (ECF No. 917)

Oracle's last motion is its present motion for attorneys' fees and costs.[2] ECF No. 917. In its request, Oracle is seeking a total of $35,627,807.99 in attorneys' fees; $4,950,560.70 in taxable costs; and $17,636,755.68 in non-taxable costs for a total attorneys' fees and costs award of $58,215,124.37. The first issue before the court is whether to award attorneys' fees in this action. Then, if the court finds that such a fee award is appropriate, the court must determine the appropriate fees award.

A. Determination of Whether to Award Fees

Under Section 505 of the Copyright Act, the court has discretion to award a prevailing party costs and attorneys' fees. *See* 17 U.S.C. § 505 ("In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party . . . . [T]he court may also award a reasonable attorney's fee to the prevailing part as part of the

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[2] Oracle's motion is accompanied by a breakdown of time spent by each contracted law firm, including the individuals who provided the work, what was being worked on, and the amount of time spent on that item as outlined in four separate declarations from Attorney Thomas S. Hixson, partner with the law firm Morgan, Lewis and Bockius LLP (ECF No. 918, Hixson Decl.); Attorney Kieran P. Ringgenberg, partner with Boies, Schiller & Flexner LLP (ECF No. 919, Ringgenberg Decl.); James C. Maroulis, Managing Counsel at Oracle (ECF No. 920, Maroulis Decl.); and Richard J. Pocker, also a partner with Boies, Schiller & Flexner LLP (ECF No. 921, Pocker Decl.). Oracle also filed a supplement to its motion for attorneys' fees and costs updating its request for fees to include time spent at trial and on post-trial motions. ECF No. 996.

costs."). In order to determine whether an award of attorneys' fees and non-taxable costs are warranted under the Copyright Act, courts examine five factors: (1) the degree of success of the prevailing party; (2) the objective reasonableness of the losing party's arguments during litigation; (3) the need to make the prevailing party whole; (4) deterrence; and (5) the purposes of the Copyright Act. *See Kirtsaeng*, 136 S. Ct. at 1986; *McCulloch v. Albert E. Price, Inc.*, 823 F.2d 316, 323 (9th Cir. 1987); *Jackson v. Axton*, 25 F.3d 884, 890 (9th Cir. 1994) (stating the five factor test for attorneys' fees under the Copyright Act). Further, the Copyright Act does not condition an award of fees on a finding of willful infringement. *Casella v. Morris*, 820 F.2d 362, 366 (11th Cir. 1987) ("[A] showing of bad faith or frivolity is not a requirement of a grant of fees."). Rather, a court must evaluate each of the relevant factors and make a decision on "a more particularized, case-by-case assessment." *Kirtsaeng*, 136 S. Ct. at 1986. Each factor to determine whether an award of attorneys' fees is warranted is addressed below.

1. Degree of Success

Oracle argues that the degree of success it achieved on its claims warrants an award of attorneys' fees in this case. The court agrees. Oracle successfully defeated all of defendants' counterclaims, including counterclaims for copyright misuses, early in this litigation. Then, at trial, Oracle successfully prevailed on its claim for copyright infringement as the jury found that Rimini infringed every one of the 93 separate copyright registrations at issue. And important to the court is the fact that the trial was a copyright infringement case first and foremost, regardless of all other claims pled. Oracle also pre-

vailed on its two separate state computer access claims against both defendants. As a result of its overall success, Oracle won a $50 million verdict against defendants - including $35,600,000 for copyright infringement and $14,427,000 for the state computer access claims - which was five times the damages number presented at trial by defendants' damages expert. There is no question to the court that a $50 million verdict is a substantial success regardless of what could have been issued in this case. Therefore, this factor weighs in favor of awarding attorneys' fees.

2. Objective Reasonableness

The second factor is the objective reasonableness of the losing party's position during the litigation. *Kirtsaeng*, 136 S. Ct. at 1983. "No matter which side wins a case, the court must assess whether the other side's position was (un)reasonable." *Id.* at 1988. However, the objective reasonableness of a losing party's position "can be only an important factor in assessing fee applications - not the controlling one." *Id.* at 1988. "That means in any given case a court may award fees even though the losing party offered reasonable arguments (or, conversely, deny fees even though the losing party made unreasonable ones)." *Id.* "For example, a court may order fee-shifting because of a party's litigation misconduct, whatever the reasonableness of his claims or defenses." *Id.* at 1988-89 (citing *Viva Video, Inc. v. Cabrera*, 9 Fed. Appx. 77, 80 (2nd Cir. 2001)). "Or a court may do so to deter repeated instances of copyright infringement or over aggressive assertions of copyright claims, again even if the losing position was reasonable in a particular case." *Id.* at 1989 (citing *Bridgeport Music, Inc. v. WB Music Corp.*, 520 F.3d 588, 593-95 (6th

Cir. 2008) (awarding fees against a copyright holder who filed hundreds of suits on an overbroad legal theory, including in a subset of cases in which it was objectively reasonable)).

Here, the court finds that defendants' litigation position that it did not engage in copyright infringement was not an objectively reasonable position. Rather, it was based on a clear misreading of Oracle's software licensing agreements and a conscious disregard for the manner that Rimini used and housed Oracle's copyrighted software programs on its own servers. In fact, Rimini's position was so unreasonable that the court was able, at summary judgment, to determine that Rimini engaged in massive copyright infringement of Oracle's copyrighted works, thereby leaving only a few issues for trial. However, throughout this litigation, including right up until trial, Rimini contended that no copyright infringement ever occurred because it did not use the copyrighted software in a proscribed manner. Based on defendants' conduct, the court finds that their position was not reasonable.

Further, even if defendants' litigation position was reasonable, the court finds that attorneys' fees are still warranted in this action because of Rimini's repeated instances of copyright infringement and its significant litigation misconduct in this action. *See Id.* It is undisputed that defendants ignored their preservation obligations and destroyed evidence prior to trial, including a key computer directory containing Oracle software that Rimini used for multiple customers in violation of customer licenses. In fact, Magistrate Judge Leen found that defendants intentionally deleted the software library well after they were on notice of potential litigation and were

well aware that the software library was potentially relevant evidence. As a result of their litigation misconduct, defendants were forced to acknowledge the spoliation and destruction of evidence at trial, and the court even gave an adverse inference jury instruction about the issue. Therefore, taking all of the above into consideration, the court finds that this factor weighs in Oracle's favor.

3. The Need to make Oracle Whole

The third factor in determining whether to award attorneys' fees under the Copyright Act is the need to make the prevailing party whole. *See McCulloch*, 823 F.2d at 323 ("[S]ection 505 is intended in part to encourage the assertion of colorable copyright claims . . . and to make the plaintiffs whole.").

In its motion, Oracle argues that an award of attorneys' fees is necessary to compensate it for its huge outlay of fees and costs necessarily incurred in enforcing its copyrights. The court agrees. Oracle has spent decades developing its copyrighted software only to have the defendants take that hard work and use it to their benefit at Oracle's expense. In order to prosecute this action, Oracle was compelled to spend a significant amount of resources in legal fees and costs over what was eventually awarded in damages just to stop defendants' unlawful conduct. Without a fee award, the court finds that Oracle's investment in its intellectual property and its incentive to create future software would not be appropriately protected or compensated.

4. Deterrence

The fourth factor in a court's attorneys' fee analysis is the need to deter defendants and others from

engaging in future infringement. *McCulloch*, 823 F.2d at 323. Here, the court finds that an award of attorneys' fees is appropriate to deter defendant Rimini from its pattern of infringing Oracle's copyrights, which started when the business began and continued until the middle of this litigation. Further, an award of fees is necessary to deter other third party service providers from engaging in similar infringing conduct in order to compete with Oracle for software support services.

5. Purpose of the Copyright Act

The last factor in a court's analysis of whether to an award attorneys' fees is whether an award will further the purposes of the Copyright Act. *See Mattel, Inc. v. MGA Entm't, Inc.*, 705 F.3d 1108, 1111 (9th Cir. 2012) ("The most important factor in determining whether to award fees under the Copyright Act, is whether an award will further the purposes of the Act.").

The court finds that awarding attorneys' fees in this action furthers the purposes of the Copyright Act as it rewards owners of intellectual property, like Oracle, for pursuing their rights under the act and "encouraging and rewarding authors' creations." *Kirtsaeng*, 136 S. Ct. at 1986. Further, as discussed above, an award of attorneys' fees would deter future infringement. As such, the court finds that a fee award is appropriate in this action. *See id.* ("[F]ee awards under § 505 should encourage the type of lawsuits that promote [the purposes of the Copyright Act].."). Accordingly, the court shall grant Oracle's

motion and issue an award of attorneys' fees under the Copyright Act.[3]

B. Amount of Fees

If a district court determines that an award of attorneys' fees is warranted under the Copyright Act (or other statutory provision), the court must determine the amount of reasonable fees to award the prevailing party. In its motion, Oracle argues that the court should award $35,627,807.99 in attorneys' fees to compensate it for the fees it incurred to prosecute this litigation. In determining the reasonableness of an award of attorneys' fees, a district court considers several non-exclusive factors, including: (1) the reputation and skill of counsel; (2) the financial terms of the client fee arrangement;[4] (3) the nature and extent of work performed and results obtained; and (4) awards in similar cases. *See* LR 54-16(b)(3);

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[3] An award of attorneys' fees is also available under both the CDAFA and the NCCL. *See* CAL. PENAL CODE § 502(e)(2) ("In any action brought pursuant to this subdivision the court may award reasonable attorney's fees."); NEV. REV. STAT. § 205.4765 ("Any victim of a crime described in NRS 205.473 to 205.513, inclusive, may bring a civil action to recover . . . [c]osts and reasonable attorney's fees incurred in bringing the civil action."). Insofar as the court has found that Oracle is entitled to attorneys' fees under the Copyright Act, the court also finds that attorneys' fees are warranted under the CDAFA and the NCCL, both of which allow attorneys' fees under factors less stringent than the Copyright Act. Further, in contrast to an award of fees under the Copyright Act, for which defendant Ravin was not found liable, the court finds that an award of fees under both the CDAFA and the NCCL may be levied against both defendants severally and equally.

[4] Here it is undisputed that Oracle's fee arrangements with counsel were hourly rate contracts for work performed in this action and were not contingency fee agreements.

Resurrection Bay Conservation All. v. City of Seward Alaska, 640 F. 3d 1087, 1095 (9th Cir. 2011).

Initially, in determining the amount of fees to award in an action, the court must look to the reasonableness of the rates charged by counsel. *Id.* Generally, courts determine a reasonable rate for attorneys' fees based upon "the rates prevailing in that district for similar services by lawyers of reasonably comparable skill, experience and reputation," irrespective of practice area. *Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 445 (9th Cir. 2010). However, "the district court may, if circumstances warrant, adjust the lodestar to account for other factors which are not subsumed within it." *Ferland v. Conrad Credit Corp.*, 224 F.3d 1145, 1149 n.4 (9th Cir. 2001). Those additional non-exclusive factors include: "(1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases." *Ballen v. City of Redmond*, 466 F.3d 736, 746 (9th Cir. 2006).

Here, the court finds that the appropriate rates for counsel in this copyright infringement action are the actual rates charged by counsel. "Unless counsel is working outside his or her normal area of practice, evidence that a billing rate was the usual rate the attorney charges for his or her services is evidence

that the rate is comparable to the market rate." *Perfect 10, Inc. v. Giganews, Inc.*, No. 11-07098, 2015 WL 1746484, at *5 (C.D. Cal. Mar. 25, 2015). Further, in an action under the Copyright Act, an award based on the actual rates charged by counsel has consistently been held to be reasonable under 17 U.S.C. § 505. *See, e.g., Kourtis v. Cameron*, 358 Fed. App'x. 863, 868 (9th Cir. 2009). This is because in such complex litigation "the parties can reasonably be expected to retain nationally respected law firms and nationally respected attorneys to pursue their interest in the litigation," which will result in "higher lodestars than normally seen in this district." *Pacquiao v. Mayweather*, 2012 WL 4092684, at *2 (D. Nev. 2012) (finding actual rates paid to California attorneys were "reasonable" and awarding them). As such, the court finds that the actual rates Oracle paid its attorneys - as established in the several declarations attached in support of Oracle's motion - are reasonable rates for this action.

Additionally, the reasonableness of the rates charged in this action is confirmed by both parties' decisions to hire national law firms. Their decisions to hire national firms reflects that the market for legal services for copyright infringement is a national market and that both parties believed only nationally-renowned firms that charged above market rates for this district could handle their cases. Therefore, the court finds that the actual rates charged by counsel in this action are reasonable rates.

Now, the issue turns to whether the amount of time billed in this case was reasonable. "[T]o determine whether attorneys for the prevailing party could have reasonably billed the hours they claim to their private clients, the district court should begin

with the billing records the prevailing party has submitted." *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1202 (9th Cir. 2013). In its motion, Oracle argues that its billing records reflect a reasonable amount of time spent on this complex litigation, and that it has made conservative adjustments to the hours actually spent by counsel prior to submitting the records.

The court has reviewed Oracle's billing records and finds that Oracle has proffered sufficient evidence for the court to find that most of the time billed by counsel was reasonable for such complex litigation. However, as identified in detail by defendants' objections to evidence submitted in support of Oracle's motion,[5] Oracle's billing records do include some inconsistencies that violate regular billing practices and guidelines, such as improper block billing entries, though the court does not find Oracle's billing records nearly as "replete" with errors as defendants contend. *See, e.g., Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 948 (9th Cir. 2007) ("[B]lock billing makes it more difficult to determine how much time was spent on particular activities."). Rather than identify every instance of a mathematical error, block billing, or missing invoice, the court finds that a blanket reduction of the requested fees in the amount of 20% is appropriate and consistent with other attorneys' fee awards under similar situations.

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[5] Along with its opposition, defendants filed two separate objections to evidence submitted in support of Oracle's motion for attorneys' fees. ECF Nos. 1005, 1031. Unless and except as specified in the court's order, the court finds that the evidentiary objections are without merit or go to the weight the court should give the evidence in determining an award of attorneys' fees, rather than the admissibility of the evidence before the court.

See, e.g., *Huhmann v. FedEx Corp.*, 2015 WL 6127198, at *8 (S.D. Cal. Oct. 16, 2015) (30% reduction for improper billing entries); *eMove, Inc. v. SMD Software, Inc.*, 2012 WL 4856276, at *7 (D. Ariz. Oct. 11, 2012) (20% reduction for improper billing entries); *Gunderson v. Mauna Kea Prop., Inc.*, 2011 WL 9754085, at *10 (D. Haw. May 9, 2011) (20% reduction for improper billing entries). Therefore, reducing Oracle's request for fees by 20%, Oracle is entitled to recover $28,502,246.40 in attorneys' fees incurred in this action.[6]

C. Costs

As part of its motion for attorneys' fees, Oracle seeks recovery of both taxable and nontaxable costs. *See* ECF No. 917. First, Oracle seeks to recover $4,950,566.70 in taxable costs, which includes deposition costs, document recovery and storage, and electronic discovery costs. Under Rule 54(d) of the Federal Rules of Civil Procedure, unless a federal statute or court order provides otherwise, costs

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[6] Defendants argue that any fee award must be further reduced because Oracle did not achieve a result greater than their pre-trial Rule 68 offers. *See Lantz v. Kreider*, 2010 WL 2609080, at *5 (D. Nev. 2010) ("The proper course of action with respect to the unaccepted Rule 68 offer of judgment is to preclude plaintiff's recovery of that portion of fees and costs related to work on the . . . claim after the date of the offer."). The court disagrees. During the course of this action, Rimini offered Oracle three separate Rule 68 Offers of Judgment. Defendants contend that the second Rule 68 offer for $60 million and the third offer for $100 million are both more favorable than the roughly $52 million obtained at trial. However, the court finds that these offers, which did not include any injunctive relief and proposed payment over several years without interest, were not "more favorable" than the ultimate judgment Oracle obtained in this action.

should be awarded to the prevailing party. FED. R. CIV. P. 54(d)(1); *see also Ass'n of Mexican-Am. Educators v. State of California*, 231 F.3d 572, 591 (9th Cir. 2000). The court has reviewed Oracle's request for taxable costs and finds that they are recoverable and reasonable. *See* 28 U.S.C. § 1920. Therefore, the court shall award Oracle $4,950,566.70 in taxable costs.

Oracle also seeks to recover $17,636,755.68 in non-taxable costs. Section 505 of the Copyright Act permits a successful plaintiff to recover all costs incurred in litigation, not just taxable costs authorized by Rule 54(d) and 28 U.S.C. § 1920. *See Twentieth Century Fox Film Corp. v. Entm't Distrib.*, 429 F.3d 869, 885 (9th Cir. 2005). Here, Oracle's request for non-taxable costs includes litigation costs for expert witness fees, additional e-discovery fees not included under 28 U.S.C. § 1920, contract attorney services, jury consulting, and other non-taxable costs. As with Oracle's request for attorneys' fees, defendants object to several of the billing records and invoices submitted in support of Oracle's request.

The court has reviewed the documents and pleadings on file in this matter and finds that Oracle is entitled to an award of non-taxable costs in this action for the same reasons the court is awarding attorneys' fees. However, similar to the award of fees, the court finds that Oracle is entitled to only a reduced amount of fees for various billing issues, including lost or non-validated invoices, vague billing descriptions and vague work entries. Because of these limited errors, the court finds that an overall reduction of 25% for almost all non-taxable costs is warranted.

As to defendants' specific challenge regarding the expert witness fees of Oracle's damages expert Elizabeth Dean, the court finds that a reduction of 50% of her expert fees and costs is appropriate. The court makes this additional reduction because, prior to trial, Oracle withdrew Dean's testimony as to one of its two damages theories in response to a motion to exclude by defendants. Thus, at trial, Oracle only presented half of Dean's prepared testimony. The court finds that it would not be fair or equitable to require defendants to pay for expert witness testimony that was withdrawn in response to their challenge, especially in light of the fact that by that time in the litigation, defendants had already deposed Dean, rebutted her report with an expert of their own, and filed a motion to exclude her report. Defendants should not bear the costs of creating the withdrawn portions of Dean's expert report. Therefore, reducing Oracle's request for costs by 50% for the expert witness costs of Elizabeth Dean ($1,812,066.02 to $906,033.01) and 25% for the rest of Oracle's requested non-taxable costs ($15,824,689.66 to $11,868,517.25), the court finds that Oracle is entitled to recover $12,774,550.26 in additional non-taxable costs for this action. Accordingly, the court shall grant Oracle's motion for attorneys' fees and costs and award Oracle fees and costs in the amount of $46,227,363.36.

IT IS THEREFORE ORDERED that plaintiffs' motion for a preliminary injunction (ECF No. 900) is GRANTED in-part and DENIED in-part in accordance with this order. Plaintiffs shall have ten (10) days after entry of this order to prepare an appropriate permanent injunction that complies with the court's order and submit the same for signature.

IT IS FURTHER ORDERED that the clerk of court shall enter judgment in favor of plaintiffs Oracle America, Inc. and Oracle International Corporation and against defendants Rimini Street, Inc. and Seth Ravin on plaintiffs' ninth cause of action for unfair competition in violation of California's Unfair Competition Law.

IT IS FURTHER ORDERED that plaintiffs' motion for prejudgment interest (ECF No. 910) is GRANTED in-part and DENIED in-part in accordance with this order. Plaintiffs shall have ten (10) days after entry of this order to prepare an appropriate order setting prejudgment interest that complies with the court's order and submit the same for signature.

IT IS FURTHER ORDERED that plaintiffs' motion for attorneys' fees and costs (ECF No. 917) is GRANTED in accordance with this order. The clerk of court shall enter an award of attorneys' fees and costs in favor of plaintiffs Oracle USA, Inc.; Oracle America, Inc.; and Oracle International Corporation and against defendants Rimini Street, Inc. and Seth Ravin in the amount of $46,227,363.36.

IT IS SO ORDERED.

DATED this 21st day of September, 2016.

s/ Larry R. Hick
LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

APPENDIX F

EXHIBIT A

Attorneys' Fees	**Dkt. 926, Ex. 1**	**Adjustments**	**Final**
Bingham and Morgan Lewis	$18,695,129.67[1]		$18,695,129.67
Boies Schiller	$12,542,840.00[2]	*-$6,480.00*[3]	$12,536,360.00
H5 & Huron	$4,360,943.20[4]		$4,360,943.20
Other (Black Letter, Barg Coffin)	$28,895.12[5]		$28,895.12
TOTAL ATTORNEYS' FEES	$35,627,807.99		**$35,621,327.99**
Taxable Costs			
Deposition Costs	$192,999.70[6]		$192,999.70
Stroz Fees for Oracle Productions	$4,757,561.00[7]	*-$1,515,279.45*[8]	$3,242,281.55

[1] Dkt. 923 ¶ 4; Dkt. 932 ¶¶ 7-8; Dkt. 937; Dkt. 939; Dkt. 972 4-5.

[2] Dkt. 924 ¶ 4; Dkt. 933 ¶¶ 3-4; Dkt. 973 ¶¶ 3-5, Ex. 1.

[3] Hixson Decl. ¶ 4.d; Richardson Decl. ¶ 19.

[4] Dkt. 923 ¶¶ 97-98.

[5] Dkt. 923 ¶¶ 99-100.

[6] Dkt. 923 ¶ 101.

Attorneys' Fees	**Dkt. 998, Ex. 1**	**Adjustments**	**Final**
TOTAL TAXABLE COSTS	$4,950,560.70		**$3,435,281.25**
Non-Taxable Costs			
Stroz Electronic Discovery Costs	$8,271,552.59[9]	*$1,515,279.45*[10]	$9,786,832.04
Expert Fees (Davis, AACG, Nodruoy, TMF)	$3,353,191.75[11]	*-$7,931.25*[12]	$3,345,260.50
Expert Fees (Elysium)	$4,466,899.61[13]	*-$815.00*[14]	$4,466,084.61
Other Consultant Fees (JRI)	$155,468.99[15]		$155,468.99
Other Consultant Fees	$159,369.10[16]		$159,369.10

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[7] Dkt. 923 ¶ 110.

[8] Hixson Decl. ¶ 4.b.

[9] Dkt. 923 ¶ 110.

[10] Hixson Decl. ¶ 4.b.

[11] Dkt. 923 ¶¶ 104-108; Dkt. 932 ¶¶ 5-6, 10.

[12] Hixson Decl. ¶ 4.a.

[13] Dkt. 924 ¶¶ 44-45; Dkt. 933 ¶ 6; Dkt. 973 ¶ 18, Ex. 1.

[14] Hixson Decl. ¶ 4.c; Richardson Decl. ¶¶ 22-23.

[15] Dkt. 923 ¶ 103; Dkt. 932 ¶ 4.

[16] Dkt. 924 ¶ 46, Ex. 1; Dkt. 973 ¶ 19.

Attorneys' Fees	**Dkt. 926, Ex. 1**	**Adjustments**	**Final**
Other Non-Taxable Costs	$585,485.44[17]		$585,485.44
Other Non-Taxable Costs	$644,788.20[18]	*-$1,409.20*[19]	$643,379.00
TOTAL NON-TAXABLE COSTS	$17,636,755.68		$19,141,879.68
TOTAL ATTORNEYS' FEES AND COSTS SOUGHT	$58,215,124.37	*-$16,635.45*	**$58,198,488.92**

[17] Dkt. 923 ¶ 101; Dkt. 972 ¶¶ 4-5.

[18] Dkt. 924 ¶ 42; Dkt. 973 ¶¶ 4, 15, Ex. 1.

[19] Hixson Decl. ¶ 4.d; Richardson Decl. ¶ 21.

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ORACLE USA, INC., a Colorado corporation; ORACLE AMERICA, INC., a Delaware corporation; and ORACLE INTERNATIONAL CORPORATION, a California corporation;	:	DATE FILED: OCT 13 2015
Plaintiffs,	:	2:10-CV-0106-LRH-PAL
v.	:	VERDICT
RIMINI STREET, INC., a Nevada corporation; and SETH RAVIN, an individual;	:	
Defendants.	:	

Instructions: When answering the following questions and filling out this Verdict Form, please refer to the Jury Instructions for guidance on the law applicable to the subject matter covered by each question.

WE THE JURY, in the above-entitled case, unanimously find as follows:

INFRINGEMENT

Question 1: PeopleSoft Documentation

Has Oracle International Corporation proven by a preponderance of the evidence that Rimini Street engaged in copyright infringement by copying copyrighted PeopleSoft documentation in a manner not authorized by the terms of the PeopleSoft software license agreements that the Court has explained to you?

✓ Yes ___ No

Question 2: J.D. Edwards Software and Documentation

Has Oracle International Corporation proven by a preponderance of the evidence that Rimini Street engaged in copyright infringement by copying copyrighted J.D. Edwards software and documentation in a manner not authorized by the terms of the J.D. Edwards software license agreements that the Court has explained to you?

✓ Yes ___ No

Question 3: Siebel Software and Documentation

Has Oracle International Corporation proven by a preponderance of the evidence that Rimini Street engaged in copyright infringement by copying copyrighted Siebel software and documentation in a manner not authorized by the terms of the Siebel software license agreements that the Court has explained to you?

✓ Yes ___ No

Question 4: Contributory Infringement

Has Oracle International Corporation proven by a preponderance of the evidence that defendant Seth Ravin engaged in contributory copyright infringement of the following Oracle International Corporation copyrighted works?

PeopleSoft Software	___ Yes	✓ No
PeopleSoft Documentation	___ Yes	✓ No
J.D. Edwards Software and Documentation	___ Yes	✓ No
Siebel Software and Documentation	___ Yes	✓ No
Oracle Database	___ Yes	✓ No

Question 5: Vicarious Infringement

Has Oracle International Corporation proven by a preponderance of the evidence that defendant Seth Ravin engaged in vicarious copyright infringement of the following Oracle International Corporation copyrighted works?

PeopleSoft Software	___ Yes	✓ No
PeopleSoft Documentation	___ Yes	✓ No
J.D. Edwards Software and Documentation	___ Yes	✓ No
Siebel Software and Documentation	___ Yes	✓ No
Oracle Database	___ Yes	✓ No

COPYRIGHT INFRINGEMENT DAMAGES

Question 6: Actual Damages

What do you find is the best measure of Oracle International Corporation's actual damages for all acts of copyright infringement engaged in by defendant Rimini Street?

Lost Profits ___

Fair Market Value License ✓

Regardless of whether you find that Lost Profits or a Fair Market Value License is the best measure of actual damages in this action, please answer all three of the following questions concerning damages: Questions 6a, 6b, and 6c. Your answer to the damages question that you find is not the best measure of actual damages (either Lost Profits or a Fair Market Value License) is advisory to the court only.

Question 6a: Lost Profits

What amount of Lost Profits, if any, has Oracle International Corporation proven by a preponderance of the evidence for all acts of copyright infringement engaged in by defendant Rimini Street? If you found in Questions 1 through 3 that defendant Rimini Street did not engage in copyright infringement as to a particular copyrighted work, please do not consider that copyrighted work in your damages amount.

Total Lost Profits: $ 0

Question 6b: Defendant's Profits

What amount of Rimini Street's Profits, if any, has Oracle International Corporation proven by a preponderance of the evidence for all acts of copy-

right infringement engaged in by defendant Rimini Street? If you found in Questions 1 through 3 that defendant Rimini Street did not engage in copyright infringement as to a particular copyrighted work, please do not consider that copyrighted work in your damages amount.

Total Amount of Defendant's Profits: $ 0

Question 6c: Fair Market Value License

What amount do you find that Oracle International Corporation has proven by a preponderance of the evidence is the Fair Market Value License for all of the infringed copyrighted works? If you found in Questions 1 through 3 that defendant Rimini Street did not engage in copyright infringement as to a particular copyrighted work, please do not consider that copyrighted work in your damages amount.

Total value of a Fair Market Value License: $ 35,600,000

Question 7: Contributory Infringement Damages

If you found that defendant Seth Ravin engaged in contributory copyright infringement, which portion of the actual damages award that you awarded against Rimini Street do you find that defendant Seth Ravin is contributorily liable for? The actual damages award that you should use for this question is whichever damages theory - either Lost Profits or a Fair Market Value License - that you determined is the best measure of actual damages.

Contributory Damages Amount: $ 0

Question 8: Vicarious Infringement Damages

If you found that defendant Seth Ravin engaged in vicarious copyright infringement, which portion of the actual damages award that you awarded against Rimini Street do you find that defendant Seth Ravin is vicariously liable for? THe actual damages award that you should use for this question is whichever damages theory - either Lost Profits or a Fair Market Value License - that you determined is the best measure of actual damages.

Vicarious Damages Amount: $ 0

STATUTORY DAMAGES

Regardless of your verdict under the section Copyright Infringement Damages above, you must determine the amount of statutory damages under the Copyright Act. To determine the amount of statutory damages under the Copyright Act, please answer the following questions. Please note that in response to Questions 9 and 10, copyright infringement need not be innocent or willful, but can simply be infringement. Questions 9 and JO reflect your finding as to special considerations for determining statutory damages under the Copyright Act. After deliberating. it may be that your answers to both Questions 9 and 10 are No. Such an answer is acceptable and contemplated under the Copyright Act.

Question 9: Innocent Infringement

Do you find that defendant Rimini Street has proven by a preponderance of the evidence that its

infringement, if any, of the following copyrighted works was innocent as explained in the jury instruction titled Copyright Infringement - Damages - Innocent Infringement?

PeopleSoft Software ✓ Yes ___ No

PeopleSoft Documentation ✓ Yes ___ No

J.D. Edwards Software and Documentation ✓ Yes ___ No

Siebel Software and Documentation ✓ Yes ___ No

Oracle Database ✓ Yes ___ No

If you found that defendant Rimini Street engaged in innocent infringement as to all of the copyright infringement that it engaged in, skip Question 10. However, if you found that defendant Rimini Street did not engage in innocent infringement as to all of the copyright infringement that it engaged in, or that it engaged in innocent infringement as to only some of the copyright infringement that it engaged in, answer Question 10.

Question 10: Willful Infringement

Do you find that plaintiff Oracle International Corporation has proven by a preponderance of the evidence that defendant Rimini Street's infringement, if any, of the following copyrighted works was willful as explained in the jury instruction titled Copyright Infringement - Damages - Willful Infringement?

PeopleSoft Software ___ Yes ✓ No

PeopleSoft Documentation ___ Yes ✓ No

J.D. Edwards Software and Documentation
___ Yes ✓ No

Siebel Software and Documentation
___ Yes ✓ No

Oracle Database ___ Yes ✓ No

Question 11: Statutory Damages

You must now determine the amount of statutory damages to award Oracle International Corporation under the Copyright Act. There are 100 copyright registrations listed in your juror book. The parties have agreed that no more than 93 copyrighted works are eligible for statutory damages.

You may award any amount between $200 and $150,000 for each copyrighted work infringed depending upon your findings regarding intent in the above questions. If you found that the infringement as to a particular copyrighted work was innocent in Question 9, then you may award between $200 and $30,000 for each such copyrighted work. However, if you found that the infringement as to a particular copyrighted work was willful in Question 10, then you may award between $750 and $150,000 for each such copyrighted work.

The total number of copyrighted works for which statutory damages is awarded is: 93

The total amount to be awarded for statutory damages is: 2,790,000

Question 12: Contributory Infringement

If you found that defendant Seth Ravin engaged in contributory copyright infringement, what portion of the statutory damages award that you awarded

against Rimini Street do you find that defendant Seth Ravin is contributorily liable for?

Contributory Statutory Damages Amount: $ 0

Question 13: Vicarious Infringement

If you found that defendant Seth Ravin engaged in vicarious copyright infringement, what portion of the statutory damages award that you awarded against Rimini Street do you find that defendant Seth Ravia is vicariously liable for?

Vicarious Statutory Damages Amount: $ 0

INDUCING BREACH OF CONTRACT/ INTENTIONAL INTERFERENCE

Question 14: Inducing Breach of Contract

Do you find that plaintiff Oracle America, Inc. has proven by a preponderance of the evidence that defendant Rimini Street and/or Seth Ravin induced customers of Oracle America, Inc. to breach their contracts with Oracle America. Inc.?

Rimini Street	___ Yes	✓ No
Seth Ravin	___ Yes	✓ No

If you answered yes to either defendant, what amount of damages did that breach of contract cause to Oracle America, Inc.? If you did not answer yes to the above question as to a particular defendant please write N/A in the appropriate space provided.

Rimini Street	$ 0
Seth Ravin	$ 0

Question 15: Intentional Interference - Oracle America, Inc.

Do you find that plaintiff Oracle America, Inc. has proven by a preponderance of the evidence that defendant Rimini Street and/or Seth Ravin intentionally interfered with economic relationships between Oracle America, Inc. and customers that probably would have resulted in an economic benefit to Oracle America, Inc.?

Rimini Street	___ Yes	✓ No
Seth Ravin	___ Yes	✓ No

If you answered yes to either defendant what amount of damages did that intentional interference cause to Oracle America, Inc.? If you did not answer yes to the above question as to a particular defendant please write N/A in the appropriate space provided.

Rimini Street	$ 0
Seth Ravin	$ 0

Question 16: Intentional Interference - Oracle International Corporation

Do you find that plaintiff Oracle International Corporation has proven by a preponderance of the evidence that defendant Rimini Street and/or Seth Ravin intentionally interfered with economic relationships between Oracle International Corporation and customers that probably would have resulted in an economic benefit to Oracle International Corporation?

Rimini Street	___ Yes	✓ No
Seth Ravin	___ Yes	✓ No

If you answered yes to either defendant what amount of damages did that intentional interference cause to Oracle International Corporation? If you did not answer yes to the above question as to a particular defendant please write N/A in the appropriate space provided.

Rimini Street	$ 0
Seth Ravin	$ 0

COMPUTER ACCESS CLAIMS

Question 17: California Computer Data Access and Fraud Act - Oracle America, Inc.

Do you find that Oracle America, Inc. has proven by a preponderance of the evidence that defendant Rimini Street and/or Seth Ravin violated the California Computer Data Access and Fraud Act as explained in the jury instructions?

Rimini Street	✓ Yes	___ No
Seth Ravin	✓ Yes	___ No

If you answered yes to either defendant what amount of damages did that violation of the California Computer Data Access and Fraud Act cause to Oracle America, Inc.? If you did not answer yes to the above question as to a particular defendant please write N/A in the appropriate space provided.

Rimini Street	$ 8,827,000
Seth Ravin	$ 8,827,000

Question 18: California Computer Data Access and Fraud Act - Oracle International Corporation

Do you find that plaintiff Oracle International Corporation has proven by a preponderance of the evidence that defendant Rimini Street and/or Seth Ravin violated the California Computer Data Access and Fraud Act as explained in the jury instructions?

Rimini Street	✓ Yes	___ No
Seth Ravin	✓ Yes	___ No

If you answered yes to either defendant what amount of damages did that violation of the California Computer Data Access and Fraud Act cause to Oracle International Corporation? If you did not answer yes to the above question as to a particular defendant please write N/A in the appropriate space provided.

Rimini Street	$ 5,600,000
Seth Ravin	$ 5,600,000

Question 19: Nevada Computer Crimes Law - Oracle America, Inc.

Do you find that Oracle America, Inc. has proven by a preponderance of the evidence that defendant Rimini Street and/or Seth Ravin violated the Nevada Computer Crimes Law as explained in the jury instructions?

Rimini Street	✓ Yes	___ No
Seth Ravin	✓ Yes	___ No

If you answered yes to either defendant what amount of damages did that violation of the Nevada Computer Crimes Law cause to Oracle America.

Inc.? If you did not answer yes to the above question as to a particular defendant please write N/A in the appropriate space provided.

Rimini Street	$ 8,827,000
Seth Ravin	$ 8,827,000

Question 20: Nevada Computer Crimes Law - Oracle International Corporation

Do you find that plaintiff Oracle International Corporation has proven by a preponderance of the evidence that defendant Rimini Street and/or Seth Ravin violated the Nevada Computer Crimes Law as explained in the jury instructions?

Rimini Street	✓ Yes	___ No
Seth Ravin	✓ Yes	___ No

If you answered yes to either defendant what amount of damages did that violation of the Nevada Computer Crimes Law cause to Oracle International Corporation? If you did not answer yes to the above question as to a particular defendant please write N/A in the appropriate space provided.

Rimini Street	$ 5,600,000
Seth Ravin	$ 5,600,000

NON-DUPLICATIVE DAMAGES

Question 21: Non-Duplicative Damages - Oracle America, Inc.

If you found that Oracle America, Inc. suffered damages as a result of defendant Rimini Street and/or Seth Ravin's conduct you must now determine the total amount of damages that is not duplicative of any other damages award in your verdict as ex-

plained in the jury instruction titled Verdict Form - Duplicative Damages. In determining this amount, you should exclude the amount awarded for Statutory Damages as well as the amount awarded, if any, for whichever damages theory you determined was not the best measure of actual damages for copyright infringement (either Lost Profits or a Fair Market Value License). The total amount of non-duplicative damages to be awarded to Oracle America, Inc. against each defendant is as follows:

Rimini Street	$ 8,827,000
Seth Ravin	$ 8,827,000

Question 22: Non-Duplicative Damages - Oracle International Corporation

If you found that Oracle International Corporation suffered damages as a result of defendant Rimini Street and/or Seth Ravin's conduct you must now determine the total amount of damages that is not duplicative of any other damages award in your verdict as explained in the jury instruction titled Verdict Form - Duplicative Damages. In determining this amount, you should exclude the amount awarded for Statutory Damages as well as the amount awarded, if any, for whichever damages theory you determined was not the best measure of actual damages for copyright infringement (either Lost Profits or a Fair Market Value License). The total amount of non-duplicative damages to be awarded to Oracle International Corporation against each defendant is as follows:

Rimini Street	$ 41,200,000
Seth Ravin	$ 5,600,000

PUNITIVE DAMAGES

If you found that Oracle America, Inc. and/or Oracle International Corporation has proven by a preponderance of the evidence that defendant Rimini Street is liable for intentional interference with prospective economic advantage (Questions 15 and 16), violating the California Computer Data Access and Fraud Act (Questions 17 and 18), or violating the Nevada Computer Crimes Law (Questions 19 and 20) please answer the following question.

Question 25: Punitive Damages - Rimini Street

Has Oracle America, Inc. and/or Oracle International Corporation proven by clear and convincing evidence that defendant Rimini Street engaged in malice, oppression, or fraud such that punitive damages against this defendant is warranted?

___ Yes ✓ No

If you found that Oracle America. Inc. and/or Oracle International Corporation has proven by a preponderance of the evidence that defendant Seth Ravin is liable for intentional interference with prospective economic advantage (Questions 15 and 16), violating the California Computer Data Access and Fraud Act (Questions 17 and 18), or violating the Nevada Computer Crimes Law (Questions 19 and 20) please answer the following question.

Question 26: Punitive Damages - Seth Ravin

Has Oracle America, Inc. and/or Oracle International Corporation proven by clear and convincing evidence that defendant Seth Ravin engaged in malice, oppression, or fraud such that punitive damages against this defendant is warranted?

___ Yes ✓ No

You have now completed the Verdict Form. Have your foreperson date and sign the form below. Then, inform the court security officer that you have reached a unanimous verdict. Do not give the envelope to the bailiff. Your foreperson should retain possession of the Verdict Form until it is requested by the judge when the court reconvenes.

Dated this 13 day of October, 2015

JURY FOREPERSON

APPENDIX H

17 U.S.C. § 505. Remedies for infringement: Costs and attorney's fees

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

* * *

28 U.S.C. § 1821. Per diem and mileage generally; subsistence

(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate Judge, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

(2) As used in this section, the term "court of the United States" includes, in addition to the courts listed in section 451 of this title, any court created by Act of Congress in a territory which is invested with any jurisdiction of a district court of the United States.

(b) A witness shall be paid an attendance fee of $40 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of

such attendance or at any time during such attendance.

(c)(1) A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route in going to and returning from the place of attendance. Such a witness shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished.

(2) A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of the Federal Government shall be paid to each witness who travels by privately owned vehicle. Computation of mileage under this paragraph shall be made on the basis of a uniformed table of distances adopted by the Administrator of General Services.

(3) Toll charges for toll roads, bridges, tunnels, and ferries, taxicab fares between places of lodging and carrier terminals, and parking fees (upon presentation of a valid parking receipt), shall be paid in full to a witness incurring such expenses.

(4) All normal travel expenses within and outside the judicial district shall be taxable as costs pursuant to section 1920 of this title.

(d)(1) A subsistence allowance shall be paid to a witness when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.

(2) A subsistence allowance for a witness shall be paid in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to section 5702(a) of title 5, for official travel in the area of attendance by employees of the Federal Government.

(3) A subsistence allowance for a witness attending in an area designated by the Administrator of General Services as a high-cost area shall be paid in an amount not to exceed the maximum actual subsistence allowance prescribed by the Administrator, pursuant to section 5702(c)(B) of title 5, for official travel in such area by employees of the Federal Government.

(4) When a witness is detained pursuant to section 3144 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.

(e) An alien who has been paroled into the United States for prosecution, pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5)), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 240 of such Act (8 U.S.C. 1252(b)) to be deportable, shall be ineligible to receive the fees or allowances provided by this section.

(f) Any witness who is incarcerated at the time that his or her testimony is given (except for a witness to whom the provisions of section 3144 of title 18 apply) may not receive fees or allowances under this section, regardless of whether such a witness is

incarcerated at the time he or she makes a claim for fees or allowances under this section.

* * *

28 U.S.C. § 1920. Taxation of costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

* * *